DOCKET

(16)

No. 89-1944-CSY
Status: GRANTED

Title: Ohio, Petitioner
v.
Ediberto Huertas

Docketed:
May 25, 1990

Court: Supreme Court of Ohio

Counsel for petitioner: White,Gregory A.

Counsel for respondent: Dana,Randall M.

052590 rec'd 40 pet 061190 rec'd 40 corr'd pet

Entry	Date	Note	Proceedings and Orders
1	May 25 1990	G	Petition for writ of certiorari filed.
3	Jul 9 1990	X	Brief of respondent Ediberto Huertas in opposition filed.
4	Jul 9 1990	G	Motion of respondent for leave to proceed in forma pauperis filed.
2	Jul 11 1990		DISTRIBUTED. September 24, 1990
6	Oct 1 1990		Motion of respondent for leave to proceed in forma pauperis GRANTED.
7	Oct 1 1990		Petition GRANTED.
			**********
8	Oct 9 1990	G	Motion of respondent for appointment of counsel filed.
9	Oct 15 1990		DISTRIBUTED. Oct. 26, 1990.
10	Oct 19 1990	D	Motion of respondent to dismiss writ of certiorari as improvidently granted filed.
12	Oct 26 1990		Brief of petitioner Ohio opposing motion to dismiss filed.
11	Oct 29 1990		Motion for appointment of counsel GRANTED and it is ordered that Joann Bour-Stokes, Esq., of Columbus, Ohio, is appointed to serve as counsel for the respondent in this case.
13	Oct 29 1990		DISTRIBUTED. Nov. 2, 1990. (Motion of respondent to dismiss writ of certiorari as improvidently granted).
14	Nov 5 1990		Motion of respondent to dismiss writ of certiorari as improvidently granted DENIED.
15	Nov 8 1990		Brief amicus curiae of California filed.
16	Nov 13 1990		Joint appendix filed.
17	Nov 13 1990		Brief of petitioner Ohio filed.
18	Nov 15 1990	G	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae filed.
19	Nov 15 1990		Brief amicus curiae of United States filed.
20	Nov 15 1990		Record filed.
		*	Certified copy of original record, 2 boxes, received.
21	Nov 15 1990	G	Motion of Appellate Committee of the California District Attorneys Association for leave to file a brief as amicus curiae filed.
22	Nov 23 1990		SET FOR ARGUMENT WEDNESDAY, JANUARY 16, 1991. (2ND CASE)
23	Nov 29 1990		CIRCULATED.
24	Dec 3 1990		Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
25	Dec 3 1990		Motion of Appellate Committee of the California District Attorneys Association for leave to file a brief as amicus curiae GRANTED.
26	Dec 11 1990	X	Brief of respondent Huertas filed.

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No. 89-1944-CSY

Entry	Date	Note	Proceedings and Orders
27	Dec 17 1990	G	Motion of Barbara Babcock, et al. for leave to file a brief as amici curiae filed.
28	Dec 17 1990	G	Motion of National Legal Aid and Defender Association for leave to file a brief as amicus curiae filed.
29	Dec 17 1990	G	Motion of National Association of Criminal Defense Lawyers, et al. for leave to file a brief as amici curiae filed.
30	Dec 17 1990	G	Motion of Murder Victims' Families for Reconciliation for leave to file a brief as amicus curiae filed.
31	Dec 17 1990	G	Motion of National Jury Project for leave to file a brief as amicus curiae filed.
32	Jan 7 1991		Motion of Barbara Babcock, et al. for leave to file a brief as amici curiae GRANTED.
33	Jan 7 1991		Motion of National Legal Aid and Defender Association for leave to file a brief as amicus curiae GRANTED.
34	Jan 7 1991		Motion of National Association of Criminal Defense Lawyers, et al. for leave to file a brief as amici curiae GRANTED.
35	Jan 7 1991		Motion of Murder Victims' Families for Reconciliation for leave to file a brief as amicus curiae GRANTED.
36	Jan 14 1991		Motion of National Jury Project for leave to file a brief as amicus curiae GRANTED.
37	Jan 16 1991		ARGUED.

PETITION FOR WRIT OF CERTIORARI

89-1944

Supreme Court, U.S.
FILED
MAY 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO:

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

STATE OF OHIO,

PETITIONER,

VS.

EDIBERTO HUERTAS,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Gregory A. White
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LORAIN COUNTY, OHIO
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I

QUESTION PRESENTED FOR REVIEW

Whether the Ohio Supreme Court has wrongfully interpreted Booth v. Maryland (1987), 107 S. Ct. 2529, and South Carolina v. Gathers (1989), 109 S. Ct. 2207, to require exclusion of all victim testimony during the penalty phase of a capital trial and by further holding that the effect of the victim's death on the surviving family members is not relevant to the defendant's personal responsibility and moral guilt when the defendant intimately knew his victim, his victim's family, and of the trauma his decision to kill would cause.

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III

OPINION BELOW

The opinion creating the issue presented to this Court was rendered by the Ohio Supreme Court in Case No. 88-1627 and published under the following citation:

State v. Huertas (1990), 51 Ohio St. 3d 22.

This case was a reversal of a decision made by the the Ninth District Court of Appeals for Lorain County, Ohio, No. 4202.

IV

STATEMENT OF CLAIMED JURISDICTION

Jurisdiction is invoked under:

28 U.S.C. 1257(3) and

Supreme Court R. 17.1(C)

The Ohio Supreme Court rendered its

decision in this case on May 9, 1990 at 1:00 p.m.

V

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution Amendment VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Constitution Amendment XIV, Section 1

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Section 2903.01

Ohio Revised Code Section 2929.02

Ohio Revised Code Section 2929.022

Ohio Revised Code Section 2929.03

Ohio Revised Code Section 2929.04

VI

STATEMENT OF THE CASE AND FACTS

The respondent, Ediberto Huertas, the victim, Sgt. Ralph Harris, Jr. USAF, and Elba Ortiz knew each other intimately. The respondent grew up with the victim. The victim referred to the respondent's parents as Mom and Pop. All three attended high school together. Everyone concerned knew the victim had a son, Ralph Harris, III.

The respondent had an extramarital affair with Elba Ortiz and fathered children with her. The victim married, divorced, and was the father of one son who resided with the victim's parent's while Sgt. Ralph Harris, Jr. was away on duty with the Air Force.

While on leave, the victim began to date Elba Ortiz. The respondent became aware of the relationship. The respondent threatened to kill the victim if he did not stop seeing Elba Ortiz. These threats took place at the home where the victim's son and mother resided in the presence of the victim's mother.

Sgt. Ralph Harris, Jr. did not stop seeing Elba Ortiz despite the respondent's threat to "waste him."

On June 6, 1986, the respondent broke into Elba Ortiz's home and stabbed Sgt. Ralph Harris, Jr. The respondent then attempted to kill Elba Ortiz. Sgt. Harris came to her aid and the respondent fled.

Sgt. Ralph Harris, Jr. subsequently died of the stab wounds inflicted by the respondent.

Respondent was convicted of

Aggravated Murder with Capital Specifications.

At the penalty phase the respondent presented two (2) main theories of mitigating evidence. Firstly, that he was intoxicated from the use of marijuana, cocaine, and alcohol. Secondly, the respondent called members of his family to demonstrate their love for the respondent and some of the tribulations of his youth.

In rebuttal, the State offered testimony of the surviving parents of the victim concerning the loss they experienced and the loss their grandson experienced.

The defense was aware that Mrs. Ralph Harris, Sr. could not request the death penalty because of religious convictions. Trial counsel specifically engaged in the following examination in

an attempt to demonstrate that she was not in favor of the jury imposing the death penalty.

Q Mrs. Harris, you have indicated to Mr. Rosenbaum; and you have indicated to Mr. Willets, that you don't want Eddie to get the death penalty, haven't you?

MR. ROSENBAUM: Objection.

THE COURT: Overruled.

A I told Mr. Rosenbaum that I am not the Judge and I'm not the Jury; and it's left up to the Courts.

Q But you don't want him to get the death penalty, do you?

A And God; and that's what I mean.

MR. ROSENBAUM: Your Honor, she answered the question.

THE COURT: Sustained.

Q Did you answer my question, Mrs. Harris?

A Yes, I did.

Q Mrs. Harris, did you think of Eddie Huertas as a son, also?

A Yes, I thought of all of them the same way.

Q They were all that close?

A Because I loved all the kids that was at my house.

Q As a Christian, you have the ability to forgive?

MR. ROSENBAUM: Objection.

THE COURT: Well, overruled.

Go ahead.

A As a Christian.
Penalty Phase Tr. at 270-271.

In response to the defense eliciting testimony that one of the victim's parents did not desire the respondent to suffer the death penalty, the State called the victim's other parent to state to the contrary.

The respondent was convicted of two (2) counts of Aggravated Murder with various capital specifications. The jury recommended the death penalty to the Court. The Honorable Floyd D. Harris, Judge imposed the death penalty on March 10, 1987.

The Ninth District Court of Appeals affirmed the conviction and death penalty in two (2) separate opinions rendered on July 6, 1988.

The Supreme Court of Ohio vacated the death penalty, but

affirmed the conviction. It remanded the case for resentencing in an opinion rendered on May 9, 1990 at 1:00 p.m.

The first ruling adverse to the petitioner that affected and created the issue presented in this petition occurred in the opinion rendered by the Ohio Supreme Court and attached in the Appendix.

The Ohio Supreme Court concluded that Booth v. Maryland (1987), 107 S. Ct. 2529 and South Carolina v. Gathers (1989), 109 S. Ct. 2207 prohibited the introduction of any type of victim impact testimony.

> In Booth v. Maryland (1987), 482 U.S. 496, decided after the trial of the instant case but before the court of appeals issued its opinion, the United States Supreme Court held that the introduction of victim

> impact evidence in the penalty phase of a capital trial is constitutionally impermissible.

State of Ohio v. Huertas (1990), 61 Ohio St. 3d 22 at 24.

Justice Douglas correctly stated in his dissenting opinion that the majority has interpreted Booth, supra, and Gathers, supra, to preclude all victim impact testimony.

> DOUGLAS, By stating"*** the Booth [v. Maryland (1987), 482 U.S. 496] court held that the admission of victim impact evidence in the sentencing phase of a capital jury trial is constitutional error," and "*** Booth prohibits consideration of victim evidence," today's majority creates a constitutional ban on the admission of any victim impact evidence and, thereby, the majority contravenes the express language in Booth.
>
> ***
>
> South Carolina v. Gathers (1989), 490 U.S. ____, 104 L.Ed. 2d 876, 109 S. Ct. 2207, was decided shortly after Booth. In the case at bar, the majority views Gathers as a mere application of the constitutional standards announced in Booth. I disagree.

Gathers further explained the tenth footnote in Booth. Therefore, Gathers should have dispelled any belief that Booth created a constitutional ban on the use of victim impact evidence, or that the use of any such evidence is constitutionally impermissible.

For purposes of the present appeal, the majority has apparently dismissed Gathers and certain relevant language in Booth. In so doing, the majority states: "*** we find no grounds on which to distinguish Booth and Gathers, and we are thus compelled to follow those cases, vacate the sentence of death, and remand for imposition of a life sentence ***." Today's majority opinion does not follow Booth or Gathers

***

By what the majority views as "following" Booth and Gathers, the majority opinion creates an automatic vacating of the death sentence anytime victim impact evidence is admitted in the sentencing phase of a capital jury trial. Because I do not believe that the United States Supreme Court intended such a result, I urge that honorable court, should this matter be appealed, to review this case which so plainly misconstrues both Booth and Gathers.

State of Ohio v. Huertas (1990), 51 Ohio St. 3d 22 at 33-35.

The Ohio Supreme Court not only erroneously excluded all victim testimony based upon Booth and Gathers, but also erroneously concluded that this Court's holding in Booth and Gathers precludes victim impact testimony in situations wherein the murderer intimately knew the victim and his family.

The Ohio Supreme Court erroneously concluded that neither Gathers nor Booth permit the jury to consider victim impact testimony when the murderer knew the victim's death would traumatize surviving relatives as a result of the assailant's personal knowledge and acquaintance with the victim and his family.

The Ohio Supreme Court held that it is not relevant to the offender's personal responsibility or moral guilt that the offender knowingly killed another human being with relatives who he

knew would suffer as a result of the decision to kill.

Appellant's Knowledge of Victim's Family

> Booth and Gathers prohibit introduction of victim impact evidence which is not "related[d] directly to the circumstances of the crime ***" Booth, supra, at 507, fn. 10; Gathers, supra, at ____, 104 L. Ed. 2d at 883, 109 S. Ct. at 2211. Impliedly, there may be an exception to the Booth rule when the victim impact evidence relates to the circumstances of the crime. (See Booth, supra, at fn. 10) It is urged that the instant case falls under this exception because appellant was acquainted with the victim and his family.
>
> The purpose of the Booth rule is to insure that the jury, in its sentencing decision, considers only that evidence which "has some bearing on the defendant's 'personal responsibility and moral guilt.' ***" Booth, supra, at 502, quoting Enmund v. Florida (1982), 458 U.S. 782, 801. In most cases, the mere fact that the killer knows his victim does not make him more or less deserving of the death penalty. For example, if appellant and Ralph Harris had not been friends, and all other circumstances had been the

> same, we doubt that anyone would consider the crime less heinous. In order to bring in victim impact evidence under the "circumstances of the crime" exception to Booth, the state must show a connection to the defendant's "personal responsibility and moral guilt."

State v. Huertas, supra, at 26.

It is more heinous to callously disregard the known effect the "decision to kill" will have upon survivors acquainted with the victim. The Ohio Supreme Court concludes that the known impact to the victim's family was not worthy of consideration or relevant to the decision to kill or pertinent to the appellant's character.

> The prosecution was certainly entitled to rebut the validity of appellant's assertions. However, the Harris' testimony does not serve this purpose. Their testimony did not relate to appellant's character, and family or drug problem. It was not rebuttal testimony.

State v. Huertas, supra at 25-26.

Through an insensitive and narrow focus the Ohio Supreme Court has belittled the known suffering that the decision to kill will cause to the surviving family members to the level of irrelevance. Clearly, it is more heinous to kill when you know the death will affect and traumatize others besides the victim. It is clearly more heinous to kill when others will be affected than it is if the offender does not know of the existence of surviving family members.

The Ohio Supreme Court has construed Booth and Gathers to blanketly preclude victim impact testimony even when the offender was aware of the victim's family and the trauma he will cause by his decision to kill. The decision to kill and knowingly leave grieving surviving relatives acquainted with the offender is relevant to the offender's personal

responsibility and moral guilt. Hence, it is relevant to the "appellant's character" and the circumstances of the crime, contrary to the conclusion reached by the Ohio Supreme Court's majority.

VII

ARGUMENT

The Ohio Supreme Court has misconstrued this Court's holding in Booth v. Maryland (1987), 107 S. Ct. 2529 and South Carolina v. Gathers (1989), 109 S. Ct. 2207. The Ohio Supreme Court, in this case, has wrongfully concluded that the devastating impact upon the surviving family is irrelevant to the circumstances of the crime and the personal responsibility and moral guilt of the killer when the killer knew that the death would traumatize the surviving family members.

The Ohio Supreme Court has ruled

that this "evidence" concerning the known trauma the death will cause to the survivors known to the killer can not be admitted based upon this Court's ruling in Booth, supra, and Gathers, supra.

The Ohio Supreme Court has totally missed the underlying rationale of this Court's decisions in Booth and Gathers.

This Court held that it was unconstitutional to permit the jury to hear victim impact testimony only if the offender was unaware of this evidence at the time of the decision to kill. There is no harm or constitutional prohibition in presenting to the jury victim impact testimony of which the killer was aware at the time he made his decision to kill. This evidence which proves that the killer callously elected to create grieving relatives to further his own goals is obviously related to the

circumstances of the crime and the offender's personal responsibility and moral guilt.

> Our capital cases have consistently recognized that "[f]or purposes of imposing the death penalty ... [the defendant's] punishment must be tailored to his personal responsibility and moral guilt."
> ***
> As in Booth, "[a]llowing the jury to rely on [this information] ... could result in imposing the death sentence because of factors about which the defendant was unaware,
> ***
> and that were irrelevant to the decision to kill." Id., at 505 107 S.Ct., at 2543.

Gathers, supra at 2210-2211.

It is obvious, therefore, that the key issue in this Court's analysis in Gathers was entirely overlooked by the Ohio Supreme Court. The "key" for tailoring the punishment to an individual defendant is, was he aware of the victim impact testimony at the time he made the decision to kill. If the offender was

aware of the victim matters encompassed by the impact testimony at the time he made the decision to kill, it it admissible. If he was not, the evidence is constitutionally prohibited.

> There is no evidence whatever that the defendant read anything that was printed on either the tract or the voter card. Indeed, it is extremely unlikely that he did so. The testimony at trial was that Gathers went through Haynes' bags very quickly, "just throwing [his belongings] everywhere, looking through things," App. 27, and that he spent not more than a minute doing so. Id., at 28. The crime took place, moreover, at night, along a dark path through a wooded area. Id., at 17; Record 621-622, 926-927. Nor did the assailants have flashlights. Id., at 622-623. Under these circumstances, the content of various papers the victim happened to be carrying when he was attacked was purely fortuitous, and cannot provide any information relevant to the defendant's moral culpability. Notwithstanding that the papers had been admitted into evidence for another purpose, their content cannot be said to relate directly to the circumstances of the crime.

Gathers, supra, at 2211.

Since the respondent intimately knew the victim, his parents, and his son, all of the victim impact evidence offered in this trial at the penalty phase was constitutionally permissible. Since the respondent's counsel sought the view of one of the surviving parents regarding the death penalty, it was permissible for the State to seek the opinion of the other parent.

The penalty phase of a capital jury trial is not solely the mitigation phase. The suffering of the victim's family (when the victim's family is known to the offender prior to the decision to kill) is every bit as relevant to the circumstances of the crime or the offender's personal responsibility and moral guilt as is the offender's family's relationship with the offender. If the

offender elects to proceed with testimony by his family members, it should be permissible for the State to do the same with the family of the victim if they were known to the offender prior to the decision to kill.

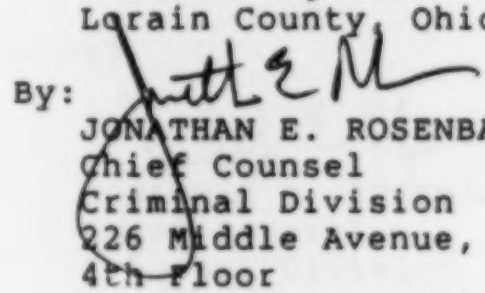
This case presents this court with the unique opportunity to express and define just when victims may be included in capital litigation and our system of justice pursuant to Booth v. Maryland, supra, and South Carolina v. Gathers, supra. The facts are unique because the offender intimately knew the victim and his family. It further presents to this Court an opportunity to clear up a misinterpretation of this Court's holding in both of these cases, which has far reaching consequences to the surviving victims of murder in Ohio.

The grieving and surviving victims

of murders deserve to be included and protected in our system of justice. This case presents The United States Supreme Court a unique chance to define the balance struck between the rights of the defendant and the inclusion of victims in our system of justice without overruling Booth or Gathers. This case also presents this Court with the opportunity to overrule these cases if it so desires.

Respectfully submitted,

GREGORY A. WHITE
Prosecuting Attorney
Lorain County, Ohio

By: 
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CERTIFICATE OF SERVICE

I, Jonathan E. Rosenbaum hereby certify, pursuant to U.S. Sup. Ct. R. 28.3 that three copies of the foregoing Petition for Writ of Certiorari to The Supreme Court of Ohio were sent to Randall M. Dana, Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio, 43266-0587, on this 8 day of May, 1990 by depositing the three copies in a United States mail box with first class postage affixed thereto. A copy of an Appearance Form entering my appearance is and was attached.

JONATHAN E. ROSENBAUM
Chief Counsel,
Criminal Division

APPENDIX

THE STATE OF OHIO, APPELLEE

v.

HUERTAS, APPELLANT.

[Cite as State v. Huertas (1990), 51 Ohio St. 3d 22.]

Criminal law-Aggravated murder-Expressions of opinion by witness of appropriateness of particular sentence violate defendant's constitutional right to have sentencing decision made by the jury and judge, when.

O.Jur 3d Criminal Law Sections 1842, 1845.

Expressions of opinion by a witness as to the appropriateness of a particular sentence in a capital case violate the defendant's constitutional right to have the sentencing decision made by the jury and judge.

(No.88-1627-Submitted January 9, 1990-Decided May 9, 1990.)

APPEAL from the Court of Appeals for Lorain County, No. 4202.

Appellant, Ediberto ("Eddie") Huertas, was convicted of the June 7, 1986 murder of Ralph Harris, Jr., and sentenced to death.

Appellant attended high school with Elba Ortiz and Harris in Lorain, Ohio. The three became friends. Before his scheduled graduation, appellant dropped out of school. Harris apparently completed school and went into the Air Force. Appellant and Ortiz developed a "shaky, on and off" relationship while in high school. Though they never married, the couple had two daughters while Ortiz was still in school.

Appellant ended the relationship with Ortiz, and entered into what was apparently a common-law marriage with his wife, Arlene. This marriage produced

three children. About a year and a half after he married Arlene, appellant resumed a relationship with Ortiz. Appellant eventually separated from his wife and lived with Ortiz intermittently during the early part of 1986. There was tension, caused by appellant's refusal to divorce his wife, and by his involvement with other women.

In May 1986, Harris came home on leave from the Air Force and began dating Ortiz. On May 31, appellant went to visit Harris, who was staying with his parents. Appellant told Harris to stop dating Ortiz because Ortiz was "his woman." Harris replied, "Your woman is Arlene. Elba is single; and I'm single." In the conversation, appellant told Harris "[h]e didn't want to end their friendship this way" but he "was going to waste him" if he didn't stop seeing Ortiz. Harris

responded, "Well, you know where I live."

Appellant came back to the Harris house an hour later. Appellant claimed that Ortiz did not want to see Harris anymore. Harris said, "if (sic) Elba says that, Elba is going to have to tell me herself." When Harris again refused to promise not to see Ortiz, appellant said, "I still say I'm going to have to waste you, *** You know, you know I don't do - I don't do it fair, *** but I'm going to waste you." Appellant admitted these conversations, but denied threatening Harris.

On the evening of June 6, appellant went home after work, "had a few beers" and smoked marijuana. Sometime after ten he went to a bar with a female friend. His roommate, Danny Lopez, joined them an hour or so later. Sometime after midnight, appellant purchased cocaine and

ingested it. Appellant and Lopez continued their rounds of Lorain-area bars until after two in the morning. By his admission, appellant consumed six to nineteen beers, six to ten shots of rum, and a quarter to a half gram of cocaine. Lopez estimated that they smoked five or six marijuana cigarettes.

That same evening, Ortiz and Harris went to a concert, returning to her apartment at about eleven. Ortiz invited Harris to spend the night. She got a call from appellant as she was getting ready for bed. Appellant seemed intoxicated. He told her he still loved her and wanted to come to the apartment. She refused, telling him that Harris was spending the night there. Angry, she hung up the phone. Appellant called back, but Ortiz refused to talk. Harris took the phone off the hook.

At about three in the morning, Harris and Ortiz were awakened by a noise at the door. Harris got up to investigate. From the bedroom, Ortiz saw someone in the hallway with a knife. She heard appellant say, "Come on now," and Harris say, "Calm down, Eddie." She heard them struggle. Then appellant said, "I got you," and "I got to go get Elba." Ortiz tried to close the bedroom door, but appellant was pushing against it with "half his shoulder and arm in" the room. Ortiz braced against the wall and held the door closed with her feet. Appellant put a hole in the door. Ortiz heard Harris throw something. Then the house became quiet.

Ortiz came out of the bedroom and found Harris injured. She drove him to the hospital, where he was admitted at 3:25 a.m. with a serious stab wound. In

the emergency room, Harris was interviewed at about 3:45 a.m. by Detective Charles Shuster of the Lorain police. Harris gave a tape-recorded statement describing appellant's attack on him.

Ralph Harris died at 2:00 that afternoon. The cause of death was loss of blood and resulting complications.

Police found appellant's fingerprints on the storm windows through which he entered the apartment. His shoe heel matched the hole in the bedroom door. Appellant's shirt had bloodstains matching Ralph Harris' (sic) blood type.

Appellant was indicted on one count of aggravated murder with prior calculation and design, one count of aggravated murder in the course of committing an aggravated burglary, two counts of attempted aggravated murder,

and one count of aggravated burglary. There were two specifications to each of the aggravated murder counts: murder committed during an aggravated burglary, and murder committed as part of a course of conduct involving the purposeful killing or attempted killing of two or more persons. The state dropped the two attempted murder counts before trial.

Appellant testified in his own defense. He admitted going to Ortiz's apartment, but claimed he was unable to recall what had happened there, except he remembered Harris saying, "You got me." He claimed that he did not plan to kill anyone. He admitted to being angry that night because Ortiz and Harris "were making love in our bed." He also admitted to having a problem with drugs and alcohol since he was seventeen.

Appellant was found guilty of all

charges and specifications. Following the mitigation hearing, the jury determined that the aggravating circumstances outweighed the mitigating factors and recommended a sentence of death on both counts. The trial court accepted this recommendation. Appellant was given a sentence of ten to twenty-five years' imprisonment on the aggravated burglary count. The Court of Appeals for Lorain County affirmed the conviction and sentence.

SUPREME COURT, JANUARY TERM, 1990

Opinion, per H. Brown, J.

This cause is before the court on an appeal as of right.

Gregory A. White, prosecuting attorney, and Jonathan E. Rosenbaum, for appellee.

Randall M. Dana, public defender, Joann Bour-Stokes, Richard J. Vickers,

and Sharon H. Hainley, for appellant.

H. BROWN, J. For the reasons which follow, we affirm appellant's conviction, but vacate the sentence of death and remand for imposition of a life sentence in accord with State v. Penix (1987), 32 Ohio St. 3d 369, 513 N.E. 2d 744.

I

Admission of Victim Impact Evidence

In his second proposition of law, appellant challenges the use of victim impact evidence at the penalty phase of his trial.

In the instant case, appellant requested a presentence investigation report pursuant to R.C. 2929.03(D)(1). The report contained a summary of an interview with the victim's parents, Ralph, Sr., and Elizabeth Harris, in which Mr. Harris expressed the view that appellant should be sentenced to death.

This report was admitted into evidence. The prosecution also called Mr. and Mrs. Harris as rebuttal witnesses.

Mrs. Harris testified concerning the victim's good character. When asked if she was proud of her son, she replied, "Oh, God, how proud I was, a child that never give me no problem, no nothing, no drinking, no smoking, nothing but go to church and come back, ***." She described the effect on the victim's son[1]: "I hate to take him to the graveyard. He always wants to go. He think[s] he [is] going to see his dad." Mr. Harris testified, in response to a question from the prosecutor, that he believed appellant should get the death penalty.

In Booth v. Maryland (1987), 482 U.S. 496, decided after the trial of the instant case but before the court of appeals issued its opinion, the United

States Supreme Court held that the introduction of victim impact evidence in the penalty phase of a capital trial is constitutionally impermissible. Victim impact evidence is defined in Booth as including evidence which describes the personal characteristics of the victim, the emotional trauma suffered by the victim's family, or the family members' opinions and characterizations of the defendant and the crime. Id. at 502. The court reasoned that "[t]he prospect of a 'mini-trial' on the victim's character *** could well distract the sentencing jury from its constitutionally required task - determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime. ***" (Emphasis added.) Id. at 507. The holding of Booth was reaffirmed in

South Carolina v. Gathers (1989), 490 U.S. ____, 104 L. Ed. 2d 876, 109 S.Ct. 2207.

In State v. Post (1987), 32 Ohio St. 3d 380, 383, 513 N.E. 2d 754, 758, we noted that the admission of victim impact evidence at capital trials was not expressly permitted by the Ohio statutes. However, in Post and two subsequent cases, State v. Sowell (1988), 39 Ohio St. 3d 322, 530 N.E. 2d 1294, and State v. Brewer (1990), 48 Ohio St. 3d 50, 549 N.E. 2d 491, we found the admission of such evidence harmless in bench trials where there was no indication that the three-judge panel relied on the victim impact evidence in arriving at its sentence. See, e.g., Post, supra, at 384, 513 N.E. 2d at 759.

Four arguments have been advanced by the state to distinguish the present case

from Booth and Gathers. These are: (1) Ohio's use of a sentencing system where the jury's recommendation of a death penalty is not binding on the trial judge, (2) distinctions between the victim impact evidence in the instant case and that presented in Booth, (3) the victim impact evidence in this case was presented to rebut appellant's mitigation evidence, and (4) Booth and Gathers allow for victim impact evidence where the killer is acquainted with the victim.

A

Jury Recommendation

The prosecution argues that Booth v. Maryland, supra, is distinguishable from the instant case because an Ohio jury's recommendation of death is not binding on the trial judge, while a Maryland jury makes the final determination of sentence. Compare Md. Ann. Code (1987),

Article 27, Section 413(K)(1), with R.C. 2929.03(D)(3). We are urged to extend Post to jury trials and require the defendant to show that the sentencing judge was influenced by victim impact evidence before the sentence may be reversed.

We find this argument unpersuasive for two reasons. First, the Booth court held that the admission of the victim impact evidence in the sentencing phase of a capital jury trial is constitutional error. Second, in Gathers, supra, the Booth rule was applied to a case decided under South Carolina's capital punishment statutes, which use a "recommendation" system similar to Ohio's. See S.C. Code Ann. (1985), Section 16-3-20(C).

B

Distinctions Based on Quality

of the Evidence

The court below found the admission of the victim impact statement to be harmless error because it was much shorter than that at issue in Booth, and because it contained statements blaming Elba Ortiz for "deceiving" the victim, which the court viewed as "favorable" to appellant. We do not agree.

It is true that the written victim impact statement at issue in Booth was longer and more detailed than that involved in the instant case, see Booth at 509-515, but Booth prohibits consideration of victim impact evidence. In Gathers, supra, the court, without reference to any presentence investigation reports or statements by surviving family members, held that it was constitutional error for the prosecutor, in his closing argument, to draw inferences about the victim's good

character based on the contents of his pockets.

Further, even if the quantity and quality of the evidence were somehow relevant under Booth and Gathers, we would still find it necessary to vacate the sentence of death. Mrs. Harris's grief-stricken, emotional testimony is compelling even in a cold transcript; it is almost impossible to believe that a jury could hear it and remain unaffected.

C

Rebuttal of Mitigating Evidence

The prosecution argues that the Harrises' testimony was offered to rebut appellant's mitigating evidence. During the penalty phase of the trial, appellant presented testimony from his family and an expert, Dr. Thomas Haglund, to the general effect that appellant was basically a good person whose crime was,

in part, caused by his problems with drugs and alcohol. Appellant himself, in an unsworn statement, expressed remorse and begged forgiveness.

The prosecution was certainly entitled to rebut the validity of appellant's assertions.[2] However, the Harrises' testimony does not serve this purpose. Their testimony did not relate to appellant's character, his family or drug problem.[3] It was not rebuttal testimony.

D

Appellant's Knowledge of Victim's Family

Booth and Gathers prohibit introduction of victim impact evidence which is not "relate[d] directly to the circumstances of the crime. ***" Booth, supra, at 507, fn. 10; Gathers, supra, at ____, 104 L. Ed 2d at 883, 109 S. Ct. at

2211. Impliedly, there may be an exception to the Booth rule when the victim impact evidence relates to the circumstances of the crime. (See Booth, supra, at fn. 10.) It is urged that the instant case falls under this exception because appellant was acquainted with the victim and his family.

The purpose of the Booth rule is to ensure that the jury, in its sentencing decision, considers only that evidence which "has some bearing on the defendant's 'personal responsibility and moral guilt.' ***" Booth, supra, at 502, quoting Enmund v. Florida (1982), 458 U.S. 782, 801. In most cases, the mere fact that the killer knows his victim does not make him more or less deserving of the death penalty. For example, if appellant and Ralph Harris had not been friends, and all other circumstances had

been the same, we doubt that anyone would consider the crime less heinous. In order to bring in victim impact evidence under the "circumstances of the crime" exception to Booth, the state must show a connection to the defendant's "personal responsibility and moral guilt."[4]

E

Testimony Recommending a

Death Sentence

Finally, the type of evidence given by the victim's family in this case goes beyond that considered in Booth and Gathers, supra. Here, a family member offered his opinion on what the appropriate sentence would be for the defendant.

A distinction should be drawn, in considering victim impact evidence, between (1) evidence relating to the victim's character, (2) evidence relating

to the circumstances of the crime, and (3) evidence consisting of the opinions of the victim's family as to an appropriate punishment for the defendant. The dissenting justices in Booth and Gathers, supra, argue that evidence of the suffering caused by a particular crime can be considered relevant to the defendant's culpability or moral guilt. See Gathers, supra, at ____, 104 L. Ed. 2d at 887-888, 109 S. Ct. at 2214-2215 (O'Connor, J., dissenting); Booth, supra, at 519-520 (Scalia, J., dissenting). Such evidence is specifically required to be considered by the sentencing court in some non-capital cases. R.C. 2947.051. However, statements by a member of the victim's family recommending a particular punishment, such as Mr. Harris's penalty phase testimony, have nothing to do with culpability or moral built. They are

simply opinions on the appropriate sentence given by someone who, though having a great personal interest in the outcome, is not a member of the jury. These opinions go to the ultimate issue, usurp the jury's function and undermine the defendant's right to trial by an impartial court.

Opinions with respect to an appropriate punishment distract the jury from its constitutional and statutory obligation to weigh mitigating factors against aggravating circumstances. Such opinions, if credited, could make imposition of punishment dependent upon whether the victim's family believed in or was opposed to capital punishment (and not "the background and record of the accused and the particular circumstances of the crime").

We therefore hold that expressions

of opinion by a witness as to the appropriateness of a particular sentence in a capital case violate the defendant's constitutional right to have the sentencing decision made by the jury and judge.

After reviewing the arguments presented, we find no grounds on which to distinguish Booth and Gathers, and we are thus compelled to follow those cases, vacate the sentence of death, and remand for imposition of a life sentence in accord with Penix, supra.

II

Voluntary Intoxication

Appellant called Dr. Thomas Haglund as an expert witness in the guilt phase to testify on the effects of intoxication and the ability of an intoxicated person to suffer a blackout. The prosecution objected, and the court refused to permit

Dr. Haglund to testify. Defense counsel proffered the testimony to negate the existence of prior calculation and design. In his first proposition of law, appellant contends that he was prevented form presenting evidence that he was incapable of forming specific intent as permitted by State v. Fox (1981), 68 Ohio St. 2d 53, 22 O.O. 3d 259, 428 N.E. 2d 410.

A defendant may present nonexpert testimony in an effort to prove that he was "'"so intoxicated as to be mentally unable to intend anything ([i.e.] unconscious)[.]"'" State v. Wilcox (1982), 70 Ohio St. 2d 182, 194, 24 O.O. 3d 284, 291, 436 N.E. 2d 523, 530, quoting State v. Jackson (1972), 32 Ohio St. 2d 203, 206, 61 O.O. 2d 433, 434, 291 N.E. 2d 432, 433; see, also, Fox, supra. However, Ohio law does not recognize the

defense of "diminished capacity."[5] Wilcox, supra, paragraph one of the syllabus. Further, except in the mitigation phase, a defendant may not introduce expert psychiatric testimony unrelated to the insanity defense for the purpose of showing that he lacked the capacity to form the specific mental state required for a particular crime. Id. at paragraph two of the syllabus; State v. Cooey (1989), 46 Ohio St. 3d 20, 544 N.E. 2d 985, paragraph one of the syllabus.

The arguments which appellant makes are the same as those advanced in Cooey. If accepted, they "would bring into Ohio law, under another guise, the diminished capacity defense we rejected in Wilcox. ***" Cooey, supra, at 26, 544 N.E. 2d at 906. Appellant has not proffered any argument which would persuade us to

depart from the Wilcox rule, and so we reject his second proposition of law on authority of Cooey and Wilcox, supra.

Appellant advances a related contention in his twelfth proposition of law. He claims that "[i]nsufficient evidence existed for prior calculation and design in this case because [appellant] *** was intoxicated at the time of the offense."

The mere fact that a defendant is intoxicated does not make him incapable of acting with prior calculation and design. Intoxication "is often voluntarily induced for the sole purpose of nerving a wicked heart to the firmness requisite for the commission of a crime soberly premeditated, or as an excuse for such crime. ***" Nichols v. State (1858), 8 Ohio St. 435, 439-440.

We have reviewed the testimony and

find that there was sufficient evidence from which reasonable minds could find prior calculation and design. A week before the killing, appellant threatened to "waste" Ralph Harris, Jr., if he continued to see Elba Ortiz. On the night he killed Harris, appellant, though intoxicated, was able to secure a knife, drive across town, break into the apartment, stab Harris, dispose of the knife, and drive himself home. While appellant testified that he suffered a "blackout" from his intoxication, it is apparent that the jury chose not to believe him.

Because there was "substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt[,]" State v. Eley (1978), 56 Ohio St. 2d 169, 10 O.O. 3d

340, 383 N.E. 2d 132, syllabus, we reject appellant's twelfth proposition of law.

III

Multiple Murder Convictions

In his third proposition of law, appellant claims that his conviction and sentencing on two counts of aggravated murder for a single killing violated R.C. 2941.25 and the Double Jeopardy Clauses of the Ohio and Unites States Constitutions. Though this issue was not raised at trial or in the court below, the prosecution has conceded that appellant cannot be convicted twice for a single offense. Accordingly, we hold that, on remand, appellant should be given only a single life sentence for the aggravated murder offense.

Appellant also contends that the jury improperly "double counted" the aggravated circumstances when weighing

them against the mitigating evidence. In view of our disposition of appellant's death sentence, we need not consider this contention.

IV

Exclusion of Jurors for Cause

In his eighth proposition of law, appellant argues that the trial court, over defense objection, improperly excused three prospective jurors, Penny Potts, Ina Hammond, and Cheryl Yagielo, for cause because they expressed opposition to the death penalty.

Mrs. Potts said that she was "not totally opposed" to capital punishment, but "would much rather go with the sentence to prison and hope that they changed." "I hope they come out with a better attitude than to kill them, whatever you want to call it," she stated. She agreed that voting for a life

sentence would be easier than voting for the death penalty. After the prosecutor challenged her for cause, the following exchange took place:

"**THE COURT:** *** Would you be able to follow exactly my instructions, or would you let your own views get in the way?

"We can't always take the easier route. Sometimes we have to do what is required and you would have to follow, it's really the law of Ohio that I am giving you.

"You think you would be able to do this?

"**MRS. POTTS:** Probably not.

"But my views would probably come back and get in the way."

"**THE COURT:** You would be in conflict?"

"**MRS. POTTS:** Yes, sir."

Mrs. Hammond said she would try to

be impartial and follow the judge's instructions, but did not really believe in the death penalty. Even if other jurors voted for the death penalty, she admitted, "I guess I would say I wouldn't vote for it, to be honest with you."

Ms. Yagielo was not opposed to the death penalty, but expressed doubts that she, personally, "could send someone to their death." When asked if there was any circumstance under which she could vote for the death penalty, she answered, "No." The judge excused Ms. Yagielo for cause without allowing defense counsel to voir dire her.

The standard for excusing a prospective juror based upon the juror's views on capital punishment is whether those views would "prevent or <u>substantially impair</u> the performance of his duties as a juror in accordance with

his instructions and oath." (Emphasis added.) State v. Rogers (1985), 17 Ohio St. 3d 174, 17 OBR 414, 478 N.E. 2d 984, paragraph three of the syllabus, vacated and remanded on other grounds (1985), 474 U.S. 1002. "*** The determination of jurors bias necessarily involves a judgment on credibility, the basis of which often will not be apparent from an appellate record. Wainwright v. Witt (1985), 469 U.S. 412, 429. For this reason, '***deference must be paid to the trial judge who sees and hears the juror.' Id. at 426. ***" State v. Depew (1988), 38 Ohio St. 3d 275, 280, 528 N.E. 2d 542, 549-550.

Applying these standards, we discern no abuse of the trial court's discretion. All three prospective jurors indicated that their views on the death penalty would, at least, substantially impair

their ability to follow the judge's instructions. Though it would have been better practice for the court to allow defense counsel to voir dire Ms. Yagielo, her unequivocal statement that she could never vote for the death penalty is, in itself, a sufficient basis to support her removal. We therefore reject appellant's eighth proposition of law.

V

Restrictions on Voir Dire Inquiry

In his sixth proposition of law, appellant contends that the trial judge unduly restricted his inquiry into jurors' views on the death penalty during individual voir dire. This issue was not raised in the court of appeals, and could be considered waived. State v. Williams (1977), 51 Ohio St. 2d 112, 5 O.O. 3d 98, 364 N.E. 2d 1364, vacated in part (1978), 438 U.S. 911; Toledo v. Reasonover

(1965), 5 Ohio St. 2d 22, 34 O.O. 2d 13, 213 N.E. 2d 179, paragraph two of the syllabus.

Normally, we would be reluctant to consider an issue of this importance to be waived in a capital case. However, in view of our disposition of appellant's death sentence, any error in the process of "death qualifying" the jury has been rendered moot, and we therefore decline to address the issue.[6]

VI

Public Voir Dire

In his seventh proposition of law, appellant contends that he was denied a right to a fair trial because the judge conducted the voir dire in public.

Initially, the trial court excluded the press and public from the voir dire proceedings pursuant to a motion by appellant. On the first day, two

potential jurors were excused for medical reasons, and nineteen potential jurors were questioned. At the beginning of the second day, an attorney for the Lorain Journal appeared in court and asked the court to reconsider its exclusionary order. Appellant and the state opposed this motion.

After hearing arguments, the court rescinded its previous ruling, stating that, "[w]e have gone through 19 prospective Jurors; and I found nothing that would be so embarrassing that there is a further need for sequestration." Appellant was granted a continuance in order to make an interlocutory appeal. The court of appeals dismissed it for lack of a final appealable order. Voir dire was resumed after a delay of about a month.

The constitutional guarantee of open

public proceedings in criminal trials extends to voir dire examinations. State, ex rel. The Repository, v. Unger (1986), 28 Ohio St. 3d 418, 421, 28 OBR 472,475, 504 N.E. 2d 37,40. Proceedings may be closed in rare circumstances, and only for cause shown that outweighs the value of openness. Press-Enterprise Co. v. Superior Court (1984), 464 U.S. 501.

Appellant claims that it was contrary to his "ultimate life/liberty interest" to allow the press and public to attend voir dire. However, appellant has failed to demonstrate prejudice, or to discredit the trial judge's finding that voir dire had revealed "nothing that would be so embarrassing that there is a further need for sequestration." In the absence of such a showing, the strong presumption in favor of an open public trial is controlling. Press-Enterprise,

supra, at 509-510. We reject appellant's seventh proposition of law.

VII

Admission of Victim's Taped Statement

In his fourteenth proposition of law, appellant challenges the admissibility of the tape recording of Ralph Harris, Jr.'s statement to Detective Shuster.

Harris gave the statement about half an hour to forty-five minutes after the stabbing. Harris was "very agitated" and "in serious pain." Harris was still under the stress of the stabbing and "had not calmed down." Over defense objection, the tape was admitted as an excited utterance under Evid. R. 803(2) and played to the jury.[7]

To be admissible under Evid. R. 803(2) as an excited utterance, a

statement must concern "some occurrence startling enough to produce a nervous excitement in the declarant," which occurrence the declarant had an opportunity to observe, and must be made "before there had been time for such nervous excitement to lose a domination over his reflective faculties. ***" Potter v. Baker (1955), 162 Ohio St. 488, 55 O.O. 389, 124 N.E.2d 140, paragraph two of the syllabus, quoted in State v. Wallace (1988), 37 Ohio St. 3d 87,89, 524 N.E. 2d 466,469. Appellant does not dispute that the statement concerns his attack on Harris, that Harris had an opportunity to observe the event, or that being stabbed in the liver is an "occurrence startling enough to produce a nervous excitement ***." He does dispute the trial court's finding that Harris was still in a state of nervous excitement

when the statement was made.

Harris made his statement while doctors were treating him. Clearly, he was agitated over the stabbing and the resultant need for emergency medical care, as both Detective Shuster's testimony and the sound of Harris's voice on the tape demonstrate. There was ample evidence to support the trial court's finding that the statement was admissible as an excited utterance. Accordingly, we reject appellant's fourteenth proposition of law.

VIII

Voluntary Manslaughter as a Lesser Included Offense

In his fifth proposition of law, appellant argues that the trial court should have given an instruction on voluntary manslaughter as a lesser included offense. The court gave an

instruction on the lesser included offense of murder, but did not give a requested voluntary manslaughter instruction.

"Voluntary manslaughter" is defined in R.C. 2903.03 as knowingly causing the death of another "while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force ***." We have previously held that voluntary manslaughter is a lesser included offense of murder, and that a trial court commits reversible error by failing to give an instruction when the elements of manslaughter are raised by the evidence. State v. Solomon (1981), 66 Ohio St. 2d 214, 20 O.O. 3d 213, 421 N.E. 2d 139. The

persuasiveness of the evidence does not control; the instruction must be given if "under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense ***." State v. Wilkins (1980), 64 Ohio St. 2d 382, 388, 18 O.O. 3d 528, 532, 415 N.E. 2d 303, 308.

At trial, appellant argued that being told on the phone by Elba Ortiz that Ralph Harris was sleeping with her constituted "sufficient provocation" to require a voluntary manslaughter instruction. Even if we were to accept this questionable argument, appellant had more than sufficient time to cool down after the telephone conversation was completed. The trial court therefore properly denied the instruction.

Appellant's present counsel appears

to have abandoned this argument, and now urges that a voluntary manslaughter instruction was required because appellant's intoxication rendered him unable to form the specific intent required for aggravated murder and murder. This is a reformulation of the diminished capacity defense which appellant presents in his first proposition of law, and which we have already determined to be devoid of merit. Accordingly, we reject appellant's fifth proposition of law.

IX

Miscellaneous Issues

In his ninth, tenth, fifteenth, and sixteenth propositions of law, appellant contests several alleged errors occurring in the guilt phase of his trial. These issues were not raised in the court of appeals and have therefore been waived.

Williams, supra; Reasonover, supra. Additionally, our review of the record reveals no basis upon which to invoke the plain error rule and reverse appellant's conviction.

In his fourth, eleventh, thirteenth, and nineteenth propositions of law, appellant asks that we reverse his death sentence based on several alleged errors in the penalty phase of his trial. In view of our reversal of appellant's death sentence, these issues are moot.

In his seventeenth, eighteenth, twentieth and twenty-first propositions of law, appellant attacks the constitutionality of Ohio's capital punishment scheme. These arguments have been rejected in previous cases. See State v. Spisak (1988), 36 Ohio St. 3d 80, 521 N.E. 2d 800; State v. Poindexter (1988), 36 Ohio St. 3d 1, 520 N.E. 3d

568; State v. Steffen (1987), 31 Ohio St. 3d 111, 31 OBR 273, 509 N.E. 2d 383; State v. Buell (1986), 22 Ohio St. 3d 124, 22 OBR 203, 489 N.E. 2d 795; State v. Jenkins (1984), 15 Ohio St. 3d 164, 15 OBR 311, 473 N.E. 2d 264. In addition, appellant has no standing to attack the death penalty because we have vacated his death sentence. Accordingly, we reject these propositions of law.

X

Conclusion

For the foregoing reasons, we vacate appellant's felony murder conviction, affirm his remaining convictions for aggravated murder with prior calculation and design and aggravated burglary, and we vacate his sentence of death. We remand the case for imposition of a life sentence.

Judgement affirmed in part,

reversed in part,

and cause remanded.

MOYER, C.J., SWEENEY, HOLMES and WRIGHT, JJ., concur.

MOYER, C.J., concurs separately.

DOUGLAS and RESNICK, JJ., separately dissent.

MOYER, C.J., concurring. I concur separately for two reasons. The first is to add my voice to that of Justice Resnick who, in her dissent, urges the United States Supreme Court to reconsider its opinions in Booth v. Maryland (1987), 482 U.S. 496, and South Carolina v. Gathers (1989), 490 U.S. ____, 104 L. Ed. 2d 876, 109 S. Ct. 2207, in order to give the state courts clear direction with respect to the admissibility of victim impact statements in the sentencing phase of a death penalty case. The fact that the majority and two dissenters in this

case all interpret the opinions and footnotes in Booth and Gathers differently demonstrates the uncertainty of the law in this area.

The second reason I concur separately is to dispel any notion that "*** today's majority creates a constitutional ban on the admission of any victim impact evidence ***," as asserted in the dissent by Justice Douglas in this case. Footnote 10 in Booth, referred to in Justice Douglas' dissent, simply does not apply to the facts in this case, and the majority opinion, therefore, obviously should not be characterized to apply to facts referred to in footnote 10. Under the holdings of both Booth and Gathers referred to in the majority opinion, we simply have no discretion, when presented with the facts in this case, to decide

that the use of the victim impact statement herein did not violate those holdings.

We can only hope that the United States Supreme Court will soon provide us with an opinion, free of footnotes with statements of substantive law, that will permit the greater use of victim impact statements in the sentencing phase of death penalty cases.

DOUGLAS, J., dissenting. By stating "*** the Booth [v. Maryland (1987), 482 U.S. 496] court held that the admission of victim impact evidence in the sentencing phase of a capital jury trial is constitutional error," and "*** Booth prohibits consideration of victim impact evidence," today's majority creates a constitutional ban on the admission of any victim impact evidence and, thereby, the majority contravenes the express

language in Booth.

If Booth is viewed as creating a constitutional ban on the admission of victim impact evidence, how can that view be justified in light of footnote 10 in Booth, which provides:

"Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime. Facts about the victim and family also may be relevant in a noncapital criminal trial. Moreover, there may be times that the victim's personal characteristics are relevant to rebut an argument offered by the defendant. See, e.g., Fed. Rule Evid. 404(a)(2)(prosecution may show peaceable

nature of victim to rebut charge that victim was aggressor). The trial judge, of course, continues to have the primary responsibility for deciding when this information is sufficiently relevant to some legitimate consideration to be admissible, and when its probative value outweighs any prejudicial effect. Cf. Fed. Rule Evid. 403." Id. at 507-508.

Obviously, Booth, by its own terms, does not create a constitutional ban on the admission of victim impact evidence. Therefore, in the case at bar, it is error for the majority to create such a ban by relying on Booth. In my view, Booth stands for the proposition that the use of victim impact evidence in the sentencing phase of a capital trial is constitutionally impermissible only when that evidence creates a substantial risk that the sentencing decision will be

based upon arbitrary or irrelevant consideration.

South Carolina v. Gathers (1989), 490 U.S. ____, 104 L. Ed. 2d 876, 109 S. Ct. 2207, was decided shortly after Booth. I disagree. Gathers further explained the tenth footnote in Booth. In the case at bar, the majority views Gathers as a mere application of the constitutional standards announced in Booth. Therefore, Gathers should have dispelled any belief that Booth created a constitutional ban on the use of victim impact evidence, or that the use of any such evidence is constitutionally impermissible.

For purposes of the present appeal, the majority has apparently dismissed Gathers and certain relevant language in Booth. In so doing, the majority states: "*** we find no grounds on which to

distinguish Booth and Gathers, and we are thus compelled to follow those cases, vacate the sentence of death, and remand for imposition of a life sentence***." Today's majority opinion does not follow Booth or Gathers.

In the case sub judice, the evidence of appellant's guilt is overwhelming. Appellant requested that Harris stop dating Elba Ortiz. When Harris apparently refused to comply with the request, appellant stated that he "was going to waste" Harris. Approximately one hour later, appellant repeated his threats stating: "I still say I'm going to have to waste you. *** I don't do it fair,*** but I'm going to waste you."

Appellant knew Harris was spending the night with Elba Ortiz at Ortiz's apartment. Harris and Ortiz were awakened by a noise at the door. Harris got up to

investigate. Appellant stabbed Harris with a knife and attempted to kill Ortiz. Harris died after describing appellant's attack on him. Appellant's shirt had blood stains matching Harris' blood type. Police found appellant's fingerprints on the storm windows through which he entered the apartment. Appellant's shoe heel matched a hole in the bedroom door of Ortiz's apartment. Appellant admitted going to Ortiz's apartment.

In my judgment, the proof of appellant's guilt is overwhelming and, further, it is my judgment that appellant would have been sentenced to death regardless of the victim impact evidence. Accordingly, I find that if the admission of the victim impact evidence was error, that error was harmless beyond a reasonable doubt. See State v. Williams (1983), 6 Ohio St. 3d 281, 6 OBR 345, 452

N.E. 2d 1323, paragraph six of the syllabus. It is also interesting to note that appellant objected to some, but not all, of the victim impact evidence, thereby waiving error, if any, involved. See e.g., State v. Broom (1988), 40 Ohio St. 3d 277, 288-289, 533 N.E. 2d 682, 695-696. Because Booth and Gathers prohibit the admission of victim impact evidence only when that evidence creates a substantial risk that the capital sentencing decision will be based upon arbitrary or irrelevant considerations, I would affirm the sentence of death since the evidence in the present case created no such risk.

Unfortunately, the majority opinion in the case at bar leaves no room to even consider whether the error was harmless and thus non prejudicial to appellant's rights. By what the majority views as

"following" Booth and Gathers, the majority opinion creates an automatic vacating of the death sentence anytime victim impact evidence is admitted in the sentencing phase of a capital jury trial. Because I do not believe that the United States Supreme Court intended such a result, I urge that honorable court, should this matter be appealed, to review this case which so plainly misconstrues both Booth and Gathers.

ALICE ROBIE RESNICK, J., dissenting. Today's holding, as well as the holdings in Booth v. Maryland (1986), 482 U.S. 496, and South Carolina v. Gathers (1989), 490 U.S. ____, 104 L. Ed. 2d 876, 109 S. Ct. 2207, is a step backward in the sentencing process in Ohio and the country. It was not until 1980 that Ohio enacted legislation concerning victims and the effect the crimes had on their

lives. R.C. 2947.051 provides "[i]n all criminal cases in which a person is convicted *** the court shall, prior to sentencing the offender, order the preparation of a victim impact statement by the department of probation." Prior to this time victims were not considered at all during the sentencing process. This has been changed by the foregoing legislation. As Justice Scalia stated in his dissent of Booth, supra, at 520, "citizens have found one sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced-which (and not moral guilt alone) is one of the reasons society

deems his act worthy of the prescribed penalty."

The majority in Booth, supra, at 504, stated, "[i]n such a case, it is the function of the sentencing jury to 'express the conscience of the community on the ultimate question of life or death.'" How can this be done without the sentencing authority knowing all the facts surrounding both the defendant and the victim? Further, the conscience of the community cannot properly be expressed if the sentencing authority lacks knowledge of the effect of the defendant's crime had on the community and especially the family, friends, and associates of the victim. I am not intimating that such information should be provided to the fact-finders in the guilt phase of the trial. But in the penalty phase a statement prepared by the

department of probation should be included and not be deemed prejudicial.

In light of recent victim rights legislation it is time that both Booth, supra, and Gathers, supra, be reconsidered so that when the sentencing authority is making that determination of whether or not to impose the death penalty it will be on an equal footing with the sentencing process in all other criminal cases. Victim impact statements are appropriate in the penalty phase of the proceedings especially in view of the fact that aggravated murder is the most heinous crime that can be committed. Why should the rights of a victim be less important? Based upon the majority's holding the sentence of life or death is determined in a vacuum. The sentencing jury is not permitted to know anything about the personal characteristics of the

victim. An appropriate, fair and just determination cannot be made without this information.

Based upon the foregoing I would find that the admission of the victim impact statement was not prejudicial error and I would therefore affirm the judgment of the court of appeals in its entirety.

FOOTNOTES

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[1] The victim's child, Ralph Harris III, was the product of a previous relationship.

[2] For example, in his cross-examination of Arlene Huertas, the prosecutor attacked her claim that appellant was a good father by eliciting testimony that appellant never paid child support.

[3] Mrs. Harris also gave an account of the altercation between Ralph, Jr., and appellant a week before the murder which duplicated her testimony in the guilt phase. Since the jury had already found appellant guilty of aggravated murder with prior calculation and design,

it is apparent that it had already accepted her version of events and discredited appellant's conflicting testimony. Further, appellant presented no testimony in the penalty phase which called Mrs. Harris's account into question.

[4] For example, if the defendant's motive for committing murder was to inflict emotional trauma on the victim's family, victim impact evidence would be relevant to the defendant's personal responsibility and moral guilt. See, e.g., State v. Morales (1987), 32 Ohio St. 3d 252, 513 N.E.2d 267 (murder committed as part of revenge plot against victim's older brother).

[5] The "diminished capacity" defense has been defined by one commentator as arising when "a sane defendant's mental abnormality at the time of the crime

prevented him from entertaining the specific mental state prescribed by statute. ***" Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage(1977), 77 Colum. L. Rev.827, 828. If asserted successfully in a jurisdiction where it is recognized, it "results in the reduction of the offense to one with a lesser maximum penalty which does not require proof of the specific intent at issue." Id. at 829.

For a more complete discussion of the diminished capacity defense, see Wilcox, supra, at 184-199, 24 O.O. 3d at 286-294, 436 N.E. 2d at 525-533.

[6] Even if we were to reverse the death sentence based on this issue, appellant's conviction would not be affected. See Lockhart v. McCree (1986), 476 U.S. 162.

[7] The tape could not be admitted under Evid. R. 804(B)(2) as a statement under belief of impending death. There is no indication that Harris believed death was imminent, or was even aware that his condition might be life-threatening. In response to a question from Det. Shuster, he stated that he did not know the seriousness of his injuries.

STATE OF OHIO COUNTY OF LORAIN	)) ss:)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
STATE OF OHIO Plaintiff-Appellee v. EDIBERTO HUERTAS Defendant-Appellant	))))))))))	C.A. NO. 4202 APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT COUNTY OF LORAIN, OHIO CASE NO. 32753

DECISION AND JOURNAL ENTRY

Dated: July 6, 1988

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

QUILLIN, J.

This is a capital case. Defendant appeals his convictions for aggravated murder, the accompanying specifications

to the aggravated murder convictions, aggravated burglary, and the imposition of the death penalty. We affirm.

On June 7, 1986, between 3:15 and 3:30 a.m., defendant, Ediberto Huertas, entered the apartment of Elba Ortiz. The victim, Ralph Harris, Jr., confronted Huertas in the hallway of the apartment. Huertas fatally stabbed Harris.

In order to understand the events that transpired in the early morning hours of June 7, some background information is helpful. Huertas was closely acquainted with both Ortiz and Harris. Huertas began a sexual relationship with Ortiz during high school and fathered two daughters as a result. Although Huertas lived with Ortiz and their daughters for various periods of time, he never married Ortiz. Huertas did however marry Arlene Huertas in

November 1982. Huertas had three children with Arlene. Huertas continued to see and have sexual relations with Ortiz even during his marriage to Arlene. Huertas and Arlene were separated and living apart at the time of Harris' death.

Huertas and Harris met and became friends while in school. Ortiz was also acquainted with Harris. After Harris joined the United States Air Force and was transferred overseas, he maintained contact with both Huertas and Ortiz.

On May 15, 1986, Harris came home on leave. About a week after returning home, Harris began dating Elba Ortiz. Huertas soon became aware of this. A week prior to the killing, Ortiz called Huertas at about 4:00 a.m. and asked him to come to her apartment. Ortiz and Huertas discussed their relationship which Huertas wished to continue. Ortiz told

Huertas that , although she still loved him, she wanted to stay with Harris.

On the morning of May 31, 1986, Huertas called on Harris at Harris' parents' house. Harris' mother overheard their conversation. Huertas asked Harris to quit seeing Ortiz. Harris refused. Huertas then told Harris that he did not wish to end their friendship this way, but, if Harris did not stop seeing Ortiz, he, Huertas, would waste Harris. Huertas then left and returned an hour later. Huertas said that he had been to see Ortiz and that she said that she did not wish to see Harris anymore. Harris responded that he would have to hear it from Ortiz herself. Huertas then made the following reply, "Well, I see you don't want us to be friends. I still say I'm going to have to waste you. You know I don't do it fair, but I'm going to waste

you." With that, Huertas left.

On the evening of June 6, Harris took Ortiz to a concert in Cleveland. They returned to Ortiz's apartment at about 11:00 p.m. Huertas called Ortiz at around 3:00 a.m. the following morning. Huertas wanted to come over and discuss their relationship. Ortiz told Huertas that he could not come over as Harris was there with her. Huertas asked if they were sleeping together and Ortiz said yes. Huertas became angry, and Ortiz hung up on him. Huertas called back minutes later. Harris laid the receiver on the floor until Huertas hung up.

Ortiz and Harris went to bed only to be awakened a short time later by sounds in the apartment. Huertas had lowered the window on the door to Ortiz's apartment, unlocked the door, and let himself in. Harris left the bedroom to investigate

the noise. Huertas met Harris in the hallway outside the bedroom. Ortiz heard Huertas say, "Come on, now." Ralph pleaded, "Calm down, Eddie." A struggle ensued and Ortiz heard Huertas say, "I got you. I got to go get Elba." Ortiz ran to the bedroom door where she braced herself to keep the door closed. Huertas managed to squeeze his arm through the door and swing at Ortiz. Huertas repeatedly kicked the bedroom door in an effort to gain entrance. Ortiz then heard a crash and everything became quite. Apparently, Harris managed to throw a fish stand at Huertas which caused him to flee. Ortiz rushed Harris to the hospital where he died later that day due to a severe loss of blood caused by a stab wound which penetrated his liver.

The Lorain police arrested Huertas at his apartment that same morning. The

police did not recover the murder weapon, however, it was speculated that Huertas used a "Rambo" type hunting knife which was last seen by Huertas and his roommate in their apartment the day prior to Harris' murder.

The grand jury indicted Huertas for aggravated burglary and two counts of aggravated murder. Each of the aggravated murder counts included the same two death penalty specifications. The first aggravated murder count charged Huertas with purposely killing Ralph Harris, Jr. with prior calculation and design. The second aggravated murder count charged Huertas with purposely killing Ralph Harris, Jr. while committing aggravated burglary. The first death penalty specification alleged that Huertas murdered Harris while committing aggravated burglary. The second death

penalty specification alleged that Harris' murder was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons.

After his arrest, and throughout the trial, Huertas maintained that due to his consumption of alcohol and drugs during the evening prior to the attack on Harris, he was able to recall little that happened after his initial phone conversation with Ortiz. Huertas took the stand on his own behalf during the guilt phase of his trial. He admitted that he killed Harris, but did not recall it. He only remembers Harris saying "you got me."

The jury found Huertas guilty of aggravated burglary, and both counts of aggravated murder. In addition, the jury found Huertas guilty of both specifications under each of the

aggravated murder counts.

During the penalty phase, both the state and Huertas presented witnesses. Huertas gave an unsworn statement in which he expressed his remorse and asked Harris' forgiveness. The jury determined beyond a reasonable doubt that the aggravating circumstances of which Huertas was found guilty outweighed the mitigating factors and recommended that Huertas be sentenced to death for both aggravated murder convictions. The trial court conducted an independent review and also found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors. The court accepted the jury's recommendation and sentenced Huertas to death on both aggravated murder convictions.

Ohio law requires that we undertake a three-part review. R.C. 2929.05(A).

First, we must consider the claims of error raised by Huertas. Second, we must independently weigh the evidence disclosed in the record and determine whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. State v. Jenkins (1984), 15 Ohio St. 3d 164, 206. Finally, we must decide whether the sentence of death is appropriate after considering whether the sentence is excessive or disproportionate to the penalty imposed in similar cases within our jurisdiction. For the reasons set forth below, we affirm the convictions and uphold the sentence of death.

ASSIGNMENT OF ERROR I

"The trial court erred by permitting the introduction of a victim impact statement at the sentencing phase of defendant' trial in violation of the Eighth and Fourteenth Amendments to the United States Constitution."

Prior to the penalty phase of the trial, Huertas requested a pre-sentence investigation report as provided in R.C. 2929.03(D)(1). The report contained statements by Ralph and Elizabeth Harris, the victim's parents, and Elba Ortiz. The state moved to admit the pre-sentence report into evidence. Although Huertas made objections not here relevant, no objection was directed to the inclusion of the above statements.

Huertas now contends that the statements of the victim's parents and Ortiz contained in the pre-sentence reports were, in essence, a victim impact statement and should not have gone to the jury. On the basis of Booth v. Maryland (1987), 482 U.S. ____, 96 L. Ed. 2d 440, and State v. Post (1987), 32 Ohio St. 3d 380, Huertas argues that the trial court erred in permitting the jury to view that

part of the pre-sentence report which contained the Harris' and Ortiz statements.

In Booth the trial court admitted, over specific objection, a lengthy victim impact statement which provided two types of information:

> "***First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family member's opinions and characterizations of the crimes and the defendant.***."

Booth, supra, at ____, 96 L. Ed. 2d at 448.

The United States Supreme Court held that because of the potential risk that a victim impact statement may lead the jury to impose the death penalty in an arbitrary and capricious manner its introduction during the penalty phase of a capital murder trial violates the Eighth Amendment of the United States

Constitution. Id. at ____, 96 L. Ed. 2d 448, 452.

In Post, the Ohio Supreme Court reviewed, in light of Booth, the defendant's contention that he was prejudiced by the introduction of a victim impact statement in a trial to three judges. The court held that, although the panel erred in admitting the victim impact statement, no reversal was warranted as the record did not demonstrate that the panel gave any weight to the statement in arriving at their sentencing decision. Therefore, the defendant was not prejudiced by the admission of the statement. Post, supra, at 383-84.

In light of Booth and Post, we conclude that the trial court erred in admitting victim statements into evidence. However, we cannot say that his

error mandates reversal.

The portion of the presentence report which contains the statements is quite short, containing only two paragraphs totaling less than one page in length; and, as opposed to Booth, the statements in the cause sub judice are both unfavorable and favorable to Huertas. The report author interviewed both of Harris' parents. While Harris' father stated that he felt Huertas should get the death penalty, the victim's mother stated that, "God has the only right to punish [Huertas]." In addition, the parents apparently laid much of the blame on Ortiz, whom they felt "deceived" their son. The remainder of the statement of Harris' parents is non-accusatory and non-condemning. The report author also interviewed Elba Ortiz and included her statement in the pre-sentence report. For

the most part, Ortiz's statement is simply a repeat of her testimony about the events leading up to and including Harris' death. Ortiz said that Huertas appeared drunk the night he killed Harris, and that he was drinking all the time and may have suffered a blackout. It was precisely Huertas' defense that he suffered a blackout on the night of Harris' death. Finally, Ortiz stated that she didn't feel Huertas should get the death penalty.

The victim impact statement admitted in Booth is a lengthy report describing the emotional and personal problems the crime caused the victims' children; it also contains comments emphasizing the outstanding qualities of the victims. A majority of the Supreme Court believed that the introduction of such a statement created an unacceptable risk that the

death penalty might be imposed arbitrarily and capriciously. However, we cannot say that the questioned statements in this case create such a risk. Indeed, one might argue that Huertas had more to gain than lose through its introduction. We conclude that Huertas was not prejudiced by the introduction in the pre-sentence report of the brief statements of Harris' parents and Ortiz.

The assignment of error is overruled.

ASSIGNMENTS OF ERROR

"II. The trial court arbitrarily denied the defendant procedural due process when the trial court reversed a prior order.

"III. The trial court denied defendant a fair trial and an impartial jury in violation of the Sixth and Fourteenth Amendments; United States Constitution and Article I, Section 10, Ohio Constitution."

Huertas moved that the potential jurors be sequestered during the death qualification stage of voir dire, and that the public be excluded from the courtroom during this stage. The state concurred in the motion and it was granted by the trial court. On the first day of death qualification questioning, nineteen potential jurors were asked individually and in private if they held any racial prejudices;[1] or attitudes, opinions or beliefs concerning the death penalty, which would prevent them from being an impartial juror and applying the law of the State of Ohio to the facts of the case.

Prior to beginning the second day of the death qualification voir dire, the Lorain Journal Company appeared before the court and asked that the court reconsider its order excluding the public

from the death qualification stage of voir dire. Both Huertas and the state objected to the appearance. However, the court permitted all the parties the opportunity to present arguments. The court then rescinded its previous ruling regarding the exclusion of the public, and suspended further voir dire until Huertas could appeal the order to this court. We dismissed Huertas' interlocutory appeal for lack of a final appealable order. Prior to resuming the death qualification stage of voir dire, the trial court stated its reasons for rescinding its prior order excluding the public. The court found that after having examined nineteen prospective jurors nothing had arisen so embarrassing as to justify the exclusion of the public from the courtroom.

Huertas contends that the trial

court's decision permitting the Lorain Journal Company to appear and move the court for reconsideration, without first giving him notice and an opportunity to prepare argument, denied him of his procedural due process rights. In addition, Huertas argues that by opening the death qualification stage of voir dire to the public, he was denied a fair trial by an impartial jury.

Sequestration of jurors during the death qualification stage of voir dire is a matter within the discretion of the trial court. State v. Mapes (1985), 19 Ohio St. 3d 108, paragraph three of the syllabus. Likewise, whether voir dire should be conducted in private is also within the trial court's discretion. This discretion, however, should be applied sparingly against the presumption of openness. State, ex rel. The Repository,

v. Unger (1986), 28 Ohio St. 3d 418, 419, 421. This "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Press-Enterprise Co. v. Superior Court of California (1984), 464 U.S. 501, 510; Unger, supra, at 421. We find nothing in the record to support Huertas' claim of prejudice.

The assignments of error are overruled.

ASSIGNMENT OF ERROR IV

> "The trial court erred and denied defendant his right to obtain witnesses in his favor as guaranteed by the Sixth and Fourteenth Amendments, United States Constitution and Article I, Section 10, Ohio Constitution."

Huertas argues that his constitutional rights to obtain witnesses in his favor pursuant to the Sixth

Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution were violated by the trial court's denial of his attempt to present the testimony of two witnesses: Mary Ann Amato, who was a jury commissioner, and Dr. Thomas Haglund.

Mary Ann Amato

Prior to trial, Huertas challenged the jury selection process claiming, among other things not now pertinent, that the wrong official drew the names from the jury wheel. Huertas attempted to call Mary Ann Amato, one of the jury commissioners, to the stand. At this point, the court interrupted defense counsel and suggested that he call the deputy clerk of court who actually drew the names for the jury array from the jury wheel. This was done. The claim of

error is frivolous.

Dr. Haglund

Huertas attempted to introduce the testimony of Dr. Haglund, a psychologist, during the guilt phase of the trial. Huertas sought to have Dr. Haglund testify as to the phenomena of blackouts caused by excessive consumption of alcohol and drugs. The trial court ruled that it would instruct the jury on the defense of voluntary intoxication, but would not permit expert testimony on the possible effects of blackouts.

The determination as to whether or not an expert's testimony is relevant and will assist the trier of fact is within the trial court's discretion. State v. Buell (1986), 22 Ohio St. 3d 124, 133. There was testimony that Huertas consumed large amounts of alcohol and drugs during the evening and early morning hours of

June 6-7. Dr. Haglund's opinion that Huertas may have suffered a blackout was based on police reports and from interviews with Huertas, in which Huertas told Haglund of his abusive use of alcohol and drugs since high school.

The trial court correctly perceived that the claim of blackouts, to the extent it differed from the defense of intoxication, was in reality the defense of diminished capacity.

In State v. Wilcox (1982), 70 Ohio St. 2d 182, the Ohio Supreme Court rejected the defense of diminished capacity saying at page 194:

> "***Unlike the notion of partial or relative insanity, conditions such as intoxication, medication, epilepsy, infancy, or senility are, in varying degrees, susceptible to quantification or objective demonstration, and to lay understanding. As the Ninth Circuit observed in Wahrlich v. Arizona, 479 F. 2d 1137, 1138 (9th Cir.), certiorari denied, 414 U.S.

1011, 94 S. Ct. 375, 38 L. Ed. 2d 249 (1973):

"'Exposure to the effects of age and of intoxicants upon state of mind is a part of common human experience which fact finders can understand and apply; indeed, they would apply them even if the state did not tell them they could. The esoterics of psychiatry are not within the ordinary ken.'

"It takes no great expertise for jurors to determine whether an accused was "so intoxicated as to be mentally unable to intend anything (unconscious),' Jackson, supra, at page 206 whereas the ability to assimilate and apply the finely differentiated psychiatric concepts associated with diminished capacity demands a sophistication (or as critics would maintain a sophistic bent) that jurors (and officers of the court) ordinarily have not developed. We are convinced as was the Bethea court, that these 'significant evidentiary distinctions' preclude treating diminished capacity and voluntary intoxication as functional equivalents for purposes of partial exculpation from criminal responsibility." "***."

The trial court did not err by

excluding Dr. Haglund's testimony.

The assignment of error is overruled.

ASSIGNMENT OF ERROR V

> "There was insufficient evidence which, if believed, would support a finding of guilt beyond a reasonable doubt."

Huertas attacks his conviction on the aggravated burglary charge. R.C. 2911.11(A)(3) reads in part:

> "No person, by force, ***shall trespass in an occupied structure, as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein***any felony, when any of the following apply:
>
> "***.
>
> "The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present."

> "Force" is defined in R.C. 2901.01(A) as:
>
> "***any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

It has been held that even the opening of unlocked doors constitutes force sufficient to satisfy the statute. State v. Lane (1976), 50 Ohio App. 2d 41; State v. Johnson (Aug. 27, 1981), Summit App. Nos. 10125 and 10166, unreported.

The evidence at trial showed, and Huertas did not deny, that access was gained to Ortiz's apartment by sliding down the window on her door and unlocking the door. Huertas argued that this was an authorized means of entrance into Ortiz's apartment, as it was the method he had used to let his daughters into the apartment a week before the attack on Harris. Ortiz testified that Huertas did not have permission to enter her locked

apartment the night of Harris' murder.

We will not reverse a jury verdict where, as here, there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. State v. Eley (1978), 56 Ohio St. 2d 169, syllabus.

The assignment of error is overruled.

ASSIGNMENT OF ERROR VI

> "The trial court erred when it shifted the burden of proving intoxication on the defendant in violation of defendant's right to due process under the Fourteenth Amendment, United States Constitution."

R.C. 2901.05(A) reads in part:

> "***The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused."

The United States Supreme Court has

ruled that R.C. 2901.05 does not violate the due process clause of the Fourteenth Amendment. Martin v. Ohio (1987), 480 U.S. ____, 94 L. Ed. 2d 267. Voluntary intoxication has long been regarded an affirmative defense in Ohio, and therefore comes under R.C. 2901.05. State v. Vargo (1927), 116 Ohio St. 495; Long v. State (1923), 109 Ohio St. 77. The trial court correctly instructed the jury that Huertas had the burden of proving the defense of voluntary intoxication.

The assignment of error is overruled.

ASSIGNMENT OF ERROR VII

> "The trial court erred to the prejudice of defendant in failing to instruct the jury on the lesser included offense of voluntary manslaughter."

The rule in Ohio as to when a charge on a lesser included offense is required is set forth in State v. Davis 91983), 6

Ohio St. 3d 91, 95.:

> "***merely because one offense can be a lesser included offense of another does not mean that a court must always instruct on both offenses where the greater offense is charged. However, such an instruction is required where '***the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which by themselves, would sustain a conviction upon a lesser included offense."
>
> "***."

The crime of voluntary manslaughter, pursuant to R.C. 2903.03, is a lesser included offense of aggravated murder and murder, State v. Muscatello (1978), 55 Ohio St. 2d 201. R.C. 2903.03(A) reads:

> "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonable sufficient to incite the person into using deadly force, shall knowingly cause the death of another."

Huertas contends that the events which occurred during the two weeks prior to Huertas' [sic] murder provide sufficient evidence to establish the mitigating circumstance of extreme emotional stress, and therefore the court should have instructed the jury on voluntary manslaughter. We disagree.

In denying Huertas' request for instructions on the lesser included offense of voluntary manslaughter, the trial court ruled:

> "***[W]e have absolutely no evidence as to any altercation between the victim and this defendant, the victim, Harris.
>
> "And the statute is quite clear there must be serious provocation occasioned by the victim; and the evidence is totally lacking. There is absolutely no evidence. The Court has to have some evidence before we can charge; and I assumed that would be tied in; but your client states that, basically, he remembers nothing.
>
> "Therefore, that is not

evidence as to any provocation."

As amended in 1982, Ohio's voluntary manslaughter statute requires an instruction if the jury could reasonably find at the time of the act that the defendant was "under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim." First, we can find no evidence in the record that Huertas was seriously provoked by the victim, Harris. Instead, Huertas knew for two weeks that Harris was seeing Ortiz. He testified that during that time he was not upset with Harris. Second, even assuming that Harris' courting of Ortiz could seriously provoke Huertas, evidence of sudden passion or a sudden fit of rage without time or opportunity for reflection or for passions to cool is also required under

the statute. State v. Pierce (1980), 64 Ohio St. 2d 281; Muscatello, supra. There is no evidence in the record that Huertas flew into a sudden fit of rage after calling Ortiz. Huertas testified that he was so intoxicated that he remembers little after hanging up the phone. While evidence of voluntary intoxication was admissible to show that Huertas could not form the necessary "purpose" or specific intent to commit aggravated murder or murder, State v. Fox (1981), 68 Ohio St. 2d 53, it was not evidence of a mitigating circumstance justifying a charge on the lesser included offense of voluntary manslaughter.

The assignment of error is overruled.

ASSIGNMENT OF ERROR VIII

> "The trial court erred by ruling that statements made in response to a police officer's questions were merely an excited utterance and therefore

admissible as an exception to the hearsay rule."

Prior to trial, Huertas moved to suppress the statement Harris made at the hospital to Detective Shuster identifying his assailant. The trial overruled Huertas' motion holding that Harris' tape recorded statement would be admitted pursuant to the excited utterance exception to the hearsay rule. Evid. R. 803(2).

Given Huertas' admission in opening statement and testimony that he did stab Harris, any possible error in the admission of Harris' statement was harmless beyond a reasonable doubt. State v. DeMarco (1987), 31 Ohio St. 3d 191; State v. Bayless (1976), 48 Ohio St. 2d 73.

The assignment of error is overruled.

ASSIGNMENT OF ERROR IX

"The trial court denied defendant his right to appear and defend in person and with counsel in violation of the Sixth and Fourteenth Amendments, United States Constitution and Article I, Section 10, Ohio Constitution."

Huertas moved, prior to trial, for permission to act as co-counsel in his own defense. The court denied permission. The Ohio Supreme Court Addressed the hybrid counsel issue in State v. Thompson 91987), 33 Ohio St. 3d 1. The court held that a defendant "has the right either to appear pro se or to have counsel, he had no corresponding right to act as co-counsel on his own behalf." Id., at 7.

The assignment of error is overruled.

"The trial court erred by failing to dismiss the indictment in violation of defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, United States Constitution and Article I, Sections 9, 10, and 16, Ohio

Constitution."

"1. The Ohio death penalty statutes are unconstitutional because there is no compelling state interest sufficient to deny defendant his fundamental right to life.

"2. The Ohio death penalty statutes are unconstitutional because they deny the accused the rights to the effective assistance of counsel in trial before an impartial jury.

"3. The Ohio death penalty statutes provide quidelines for the imposition of the death penalty that are vague and indefinite and therefore unconstitutional.

"4. The Ohio death penalty statutes place an unconstitutional burden of proof on the defendant and infringe upon his right to be free from self-incrimination.

"5. The Ohio death penalty statutes are unconstitutional because they fail to have a meaningful basis distinguishing between life and death sentences."

Huertas concedes that his challenges to Ohio's death penalty statutes have previously been considered and rejected by the Ohio Supreme Court. See State v. Jenkins (1984), 15 Ohio St. 3d 164; State v. Maurer (1984), 15 Ohio St. 3d 239; and State v. Buell (1986), 22 Ohio St. 3d 124. Huertas asserts these issues on appeal to preserve them for further appeal to the Ohio Supreme Court, and, if necessary, the United States Supreme Court.

The assignment of error is overruled.

Having addressed each of Huertas' assignments of error, we are now required, pursuant to R.C. 2929.05, to:

> "***review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the

mitigating factors in the case,***."

The aggravating circumstances which were proved beyond a reasonable doubt were the following: (1) the offense was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons; (2) the offense was committed while the offender was committing aggravated burglary. R.C. 2929.04(A)(5) and (7).

R.C. 2929.04(B) provides that, in weighing the mitigating factors, the sentencing authority:

> "***shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:
>
> "(1) Whether the victim of the offense induced or facilitated it;
>
> "(2) Whether it is unlikely that the offense would

have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

"(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

"***."

During the penalty phase, Huertas introduced evidence concerning a number of mitigating factors. Huertas attempted to characterize the crime as one of passion brought on by weeks of being taken on an emotional roller coaster ride by Elba Ortiz. There was testimony that Huertas could not bear to have Ortiz sleep with another man in the bed they had purchased together.

Members of Huertas' immediate family testified as to his background and upbringing. Huertas came to Lorain from Brooklyn, New York, at an early age with the Ascensios, whom he believed to be his parents. Huertas found out as a teenager that his real mother and father were involved in drugs and criminal lifestyles, and that the Ascensios were actually his grandparents. Nonetheless,

Huertas had a relatively normal childhood being raised by his grandparents and he concurred with their testimony that he received much love and affection while growing up.

Huertas also presented evidence that he had abused alcohol and drugs since high school and, as a result of his prolonged abuse, experienced blackouts as he did on the night Harris was killed. Elba Ortiz testified that she noticed that Huertas was drinking significant amounts on the weekends prior to Harris' death. On the other hand, Huertas' grandparents and his workplace supervisor, people who observed Huertas on almost a daily basis, saw nothing in his behavior to cause any concern that Huertas may be having a problem with drugs and alcohol.

Other factors presented in

mitigation were Huertas' age, lack of significant prior criminal convictions and delinquency adjudications, good work record, good behavior while confined in the Lorain County Correctional Facility, and the reciprocal love between Huertas and his five children. Finally, Huertas gave an unsworn statement in which he expressed remorse for killing Ralph Harris, Jr., whom he considered a close friend and asked Harris' family for forgiveness.

Huertas was twenty-seven at the time of the attack. His characterization of the crime as one of passion induced by sudden provocation is not supported by the evidence. Ortiz told Huertas over a week earlier that she wished to continue seeing Harris. This led Huertas to threaten Harris. Huertas armed himself prior to leaving his apartment, drove

across town to Ortiz's apartment, entered stealthily, attacked Harris and Ortiz, left the scene, and disposed of the murder weapon.

Huertas contends that the evidence demonstrates no significant criminal history. While it is true that Huertas had no prior felony convictions, the pre-sentence report does demonstrate problems involving the disregard for the private property of others and, more significantly, violations concerning the brandishing of a knife or similar weapon. At seventeen, Huertas was convicted of criminal trespass. Also that year, Huertas was convicted of assault. As an adult, Huertas was convicted of carrying a concealed weapon, a switchblade knife. Finally, at the age of twenty-three Huertas was convicted of assault for attempting to stab another man in a gas

station parking lot.

We must also "consider and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character and background of the offender." Huertas' history, character and background were discussed above. Huertas argued vehemently that his extensive use of drugs and alcohol played a major factor in Harris' death. Whatever the realities concerning Huertas' long-term use of alcohol and drugs or his use the night he killed Harris, he was able to formulate a plan to kill Harris and Ortiz, and, at least partially, carry out that plan. The facts show that Huertas invaded an apartment in the early morning hours, in which two of his children were sleeping, and purposely killed a man he had known since high

school. But for the actions of the wounded Harris, Huertas might have successfully completed his attack on Ortiz, the children's mother. After an independent review of the evidence, we conclude that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

The final part of our review is to determine whether Huertas' death sentence is excessive or disproportionate to the death penalty imposed in similar cases within our jurisdiction. R.C. 2929.05; State v. Steffen (1987), 31 Ohio St. 3d 111, 123-24.

This court has previously reviewed and affirmed four penalties of death. State v. Cooey (Dec. 23, 1987), Summit App. No. 12943, unreported; State v. Benner (July 22, 1987), Summit App. No. 12664, unreported; State v. Greer (Mar.

4, 1987), Summit App. No. 12258, unreported; and State v. Po't (Jan. 15, 1986), Lorain App. No. 3868, unreported. Each of these cases involved the aggravating circumstance of felony murder. The sentence imposed here is neither excessive nor disproportionate.

Having completed our review pursuant to R.C. 2929.05(A) we hold: (1) that Huertas' assignments of error, having been fully considered, are without merit and, therefore, are overruled; (2) after independently weighing all of the facts and other evidence disclosed in the record in the case and considering the offense and the offender, we find that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case beyond a reasonable doubt; and (3) the death penalty is appropriate and is

not excessive or disproportionate to the penalty imposed in similar cases within the jurisdiction of this court. We, therefore, affirm Huertas' convictions and sentence of death.

-

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Lorain Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court

of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

WILLIAM R. BAIRD
PRESIDING JUDGE

DANIEL B. QUILLIN
JUDGE

MARY CACIOPPO
JUDGE

BAIRD, P. J.
CACIOPPO, J.
CONCUR

APPEARANCES:

GREGORY A. WHITE, Prosecuting Attorney, 226 Middle Ave., Elyria, OH 44035 for Plaintiff.

JACK W. BRADLEY, Attorney at Law, 520 Broadway Ave., Lorain, OH 44052 for Defendant.

FOOTNOTES

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1 The defendant in this case is Hispanic, as is Elba Ortiz. The victim was black.

STATE OF OHIO	)	IN THE COURT OF
	) ss:	APPEALS NINTH
COUNTY OF LORAIN	)	JUDICIAL
		DISTRICT
STATE OF OHIO	)	C.A. NO. 4202
	)	
Plaintiff-Appellee	)	
	)	
v.	)	APPEAL FROM
	)	JUDGMENT ENTERED
EDIBERTO HUERTAS	)	IN THE COMMON
	)	PLEAS COURT OF
Defendant-Appellant	)	LORAIN, OHIO
	)	CASE NO. 32753

SEPARATE OPINION PURSUANT

TO R.C. 2929.05(A)

Pursuant to R.C. 2929.05, this court

certifies that it has reviewed the judgment in the case and the sentence of death imposed by the court. This court has also reviewed and independently weighed all of the facts and other evidence disclosed in the record in the case and considered the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case. Finally, this court has considered whether the death sentence is inappropriate or disproportionate to the penalty imposed in similar cases.

Upon such a review, this court makes the following findings:

(1) Appellant's assignments of error, having been fully considered, are without merit and are each overruled.

(2) The evidence supports the jury's findings that appellant is guilty of each crime charged and the aggravating circumstances.

(3) The jury properly found that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt.

(4) Upon an independent review of the evidence, and upon independent weighing of the aggravating circumstances proven beyond a reasonable doubt, with the mitigating factors proven by a preponderance of the evidence, the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

(5) The sentence of death in this case

is appropriate and is not excessive or disproportionate to the penalty imposed in similar cases within the jurisdiction of this court.

Accordingly, this court affirms the death penalty imposed on appellant.

William R. Baird
Presiding Judge

Daniel B. Quillin
Judge

Mary Cacioppo
Judge

cc: Jonathan E. Rosenbaum, Prosecutor, 226 Middle Ave., Elyria, Ohio 44035, for Plaintiff.

Jack Bradley, Attorney at Law, 520 Broadway, 2nd Floor, Lorain, Ohio 44052, for Defendant.

OHIO REVISED CODE SECTIONS

2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnaping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is

specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because

he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

2929.02 Penalties for murder.

(A) Whoever is convicted of, pleads guilty to, or pleads no contest and is found guilty of, aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 [2929.02.3] or division (C) of section 2929.05 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five

thousand dollars.

(B) Whoever is convicted of, pleads guilty to, or pleads no contest and is found guilty of, murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

HISTORY; 134 v H 511 (Eff 1-1-74);

139 v S 1. Eff 10-19-81.

2929.022 [Determination of aggravating circumstances.]

(A) If an indictment or count in an indictment charging a defendant with aggravated murder contains a specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, the defendant may elect to have the panel of three judges, if he waives trial by jury, or the trial judge, if he is tried by jury, determine the existence of that aggravating circumstance at the sentencing hearing held pursuant to divisions (C) and (D) of section 2929.03 of the Revised Code.

(1) If the defendant does not elect to have the existence of the aggravating circumstance determined at the sentencing hearing, the defendant shall be tried on

the charge of aggravated murder, on the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, and on any other specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code in a single trial as in any other criminal case in which a person is charged with aggravated murder and specifications.

(2) If the defendant does elect to have the existence of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code determined at the sentencing hearing, then, following a verdict of guilty of the charge of aggravated murder, the panel of three judges or the trial judge shall:

(a) Hold a sentencing hearing

pursuant to division (B) of this section, unless required to do otherwise under division (A)(2)(b) of this section;

(b) If the offender raises the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense, conduct a hearing to determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

(i) If that aggravating circumstance is proven beyond a reasonable doubt or if the defendant at trial was convicted of any other specification of an aggravating

circumstance, the panel or judge shall impose sentence according to division (E) of section 2929.03 of the Revised Code;

(ii) If that aggravating circumstance is not proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) At the sentencing hearing, the panel of judges, if the defendant was tried by a panel of three judges, or the trial judge, if the defendant was tried by jury, shall, when required pursuant to division (A)(2) of this section, first determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of

section 2929.04 of the Revised Code is proven beyond a reasonable doubt. If the panel of judges or the trial judge determines that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt or if they do not determine that the specification is proven beyond a reasonable doubt but the defendant at trial was convicted of a specification of any other aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge and trial jury shall impose sentence on the offender pursuant to division (D) of section 2929.03 and section 2929.04 of the Revised Code. If the panel of judges or the trial judge does not determine that the specification

of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge shall terminate the sentencing hearing and impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

HISTORY: 139 v S 1. Eff 10-19-81.

2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating

circumstances listed in division(A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the

offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whethér the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and

regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be

determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a

pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall no be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a

jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if

any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement,he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable

doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trail, the testimony, other evidence, statement of the offender, arguments of counsel, and if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the

mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentence to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of

death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trail, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent

such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of

three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of of committing, and the reasons why the aggravating circumstances the

offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or

panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section in not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president or vice president-elect of the Unites States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or

knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnaping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and

the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the

offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to division (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

OPPOSITION

BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 89-1944 (15)

In the

Supreme Court of The United States

October Term. 1990

STATE OF OHIO,

Petitioner,

-vs-

EDIBERTO HUERTAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

RANDALL M. DANA
Ohio Public Defender

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COUNSEL FOR RESPONDENT

42 pp

QUESTION PRESENTED

I. Whether The Introduction Of A Victim Impact Statement And Victim Impact Testimony In The Penalty Phase Of A Capital Trial Violates Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, ___ U.S. ___, 109 S. Ct. 2207 (1989).

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No. 89-1944

In the

Supreme Court of The United States

October Term, 1990

STATE OF OHIO,

Petitioner,

-vs-

EDIBERTO HUERTAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Respondent, Ediberto Huertas, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ohio Supreme Court's opinion in this case. That opinion is reported at 51 Ohio St. 3d 22 (1990).

STATEMENT OF THE CASE

On January 6, 1987, Ediberto Huertas proceeded to trial for the murder of Ralph Harris, Jr. Testimony at trial revealed that one month prior to his death, Ralph Harris had returned home to Lorain, Ohio, on leave from the military. While on leave, Ralph Harris had a relationship with Elba Ortiz. Respondent Huertas also had a longtime relationship with Elba Ortiz that had produced two children. The relationship between Elba Ortiz and Ralph Harris

caused great distress to Respondent Huertas. It was this relationship that was the crucial precipitating factor that led to the murder of Ralph Harris.

On the night of the murder, Respondent Huertas frequented several bars and ingested drugs. Respondent's alcohol use included, over the course of the evening, approximately six to sixteen beers and six to ten shots of rum. Additionally, Mr. Huertas smoked five marijuana cigarettes, and snorted one half of gram of cocaine.

When the bars closed that evening, Mr. Huertas returned home to his apartment. He telephoned Elba Ortiz and discovered that she was sleeping with Ralph Harris. Respondent Huertas became angry and ended the conversation. Later that evening, Respondent Huertas went to Elba Ortiz's apartment, and the stabbing of Ralph Harris occurred.

At the conclusion of the guilt phase of Respondent Huertas' capital trial, defense counsel requested that a presentence investigation report be prepared for the penalty phase pursuant to Ohio Rev. Code Ann. Section 2929.03(D)(1). The presentence investigation report was prepared and included within it was a victim impact statement (A-1). The victim impact statement detailed a visit with the victim's parents, Ralph, Sr. and Elizabeth Harris. Defense counsel objected to the report being admitted into evidence. The trial court overruled the objection, and allowed the report to go to the jury.

Mr. and Mrs. Harris also testified at the penalty phase. They were called as rebuttal witnesses by the State of Ohio. Mrs. Harris, in effect repeated the substance of her testimony at the guilt phase. Her testimony was interspersed with expressions of grief over the loss of her son, and

statements concerning the good character of her son. Mr. Harris expressed the belief that Respondent Huertas should receive the death penalty.

The jury recommended that Respondent receive the death penalty, and the trial court accepted that recommendation, and sentenced Respondent Huertas to death.

REASONS WHY THE PETITION SHOULD BE DENIED

THIS COURT'S DECISIONS IN BOOTH V. MARYLAND, 482 U.S. 496 (1987), AND SOUTH CAROLINA V. GATHERS, ___ U.S. ___, 109 S. CT. 2207 (1989), CONTROL THE CONCLUSION BY THE OHIO SUPREME COURT THAT VICTIM IMPACT EVIDENCE WAS IMPROPERLY ADMITTED IN RESPONDENT'S CAPITAL TRIAL.

The Ohio Supreme Court's decision in this case was controlled by the decisions in Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, ___ U.S. ___, 109 S. Ct. 2207 (1989).[1] The victim impact evidence admitted violated the constitutional principles of these cases and undermined the reliability of Respondent's death sentence. The Ohio Supreme Court was constitutionally correct in reversing Respondent's death sentence.

The victim impact evidence in the case sub judice arose in two forms. The jury was exposed to the prejudicial information through a victim impact statement contained in the presentence investigation report, and through actual testimony at the penalty phase of Respondent's capital trial.

A victim impact statement was attached to the presentence investigation report prepared for Respondent's penalty phase (A-1). The report contained an interview with Ralph and Elizabeth Harris, the victim's parents. The report explained that the victim was in the military, and had been raised "to respect others and to go to church." Additionally, Mr. Harris, the victim's

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[1] The Ohio Supreme Court's decision was also controlled by Ohio law. Ohio's statutory framework prohibited the introduction of victim impact evidence in a capital case before this Court's announcement of the decision in Booth v. Maryland, 482 U.S. 496 (1987). State v. Post, 32 Ohio St. 3d 380 (1987) and State v. Sowell, 39 Ohio St. 3d 322 (1988).

father, "stated that since his son's life was taken, that the defendant deserves to get the death penalty." (A-3.)

These characterizations were then supplemented by the testimony of Mr. and Mrs. Harris at the penalty phase of Respondent's trial. The Harrises were called as rebuttal witnesses by the State of Ohio. Respondent had presented various family members and a psychologist as witnesses in his case. The State then called Mr. and Mrs. Harris to the stand.

The initial portion of Mrs. Harris' testimony echoed that given in the guilt phase. Contained within this testimony were various expressions of her grief. These expressions included, "Oh Jesus, Jesus", "Oh, why did he do it, Lord? Why did he do it, Jesus?" (M. Tr. 264; A-17.) The remaining substance of Mrs. Harris' testimony was confined to the good character of her son and the impact of her son's death on her grandson, Ralph Harris, III.

Q. Ma'am, were you proud of your son, Ralph Harris, Jr.?

A. Oh, God, how proud I was, a child that never give me no problem, no nothing, no drinking, no smoking, nothing but go to church and come back and do his Army, work out for Karate.

Oh, God, no dope, no nothing; and he wanted to be something.

Q. Does Ralph Harris, III miss his father?

A. Oh, God, yes. I hate to take him to the graveyard. He always wants to go. He think he going to see his dad. Oh, dear God, please help us, help us, Lord, Jesus.

MR. ROSENBAUM: I have no other questions, Your Honor.

A. Jesus.

THE COURT: Do you want to take a drink of water, Mrs. Harris?

A. Oh, what a good kid. Oh, Jesus, help me. Please help me.

(M. Tr. 265, A-18.)

The victim's father, Ralph Harris, Sr., was then called to the witness stand by the State of Ohio. Mr. Harris' testimony involved one issue. He testified that the respondent should receive the electric chair for killing his son. (M. Tr. 274, A-27.)

The information conveyed by Mr. and Mrs. Harris, in the victim impact statement, and through their testimony, constitutes victim impact evidence as defined by this Court in Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, ___ U.S. ___, 109 S. Ct. 2207 (1989). It "described the personal characteristics of the victim[] and the emotional impact of the crime[] on the family, and set forth the family members' opinions and characterizations of the crime[] and the defendant." Booth v. Maryland, 482 U.S. at 502-03. As such, the Harris' statements and testimony were irrelevant to the sentencing decision. Id.

Petitioner contends that the Ohio Supreme Court in the present case misconstrued this Court's holdings in Booth v. Maryland and South Carolina v. Gathers. To support its argument Petitioner advances the assertion that "[t]here is no harm or constitutional prohibition in presenting to the jury victim impact testimony of which the killer was aware at the time he made his decision to kill." (Petitioner's Writ, p. 16.) This argument ignores the

record evidence in the present case, and also ignores the principles adopted in Booth and Gathers.

No evidence exists in the record to support the fact that Ediberto Huertas killed Ralph Harris, Jr., to cause any emotional distress to the Harris family. While the record reveals that Ediberto Huertas and Ralph Harris, Jr., were friends, the record does not support the motive attributed to Respondent by the State of Ohio. As a matter of fact, the Ohio Supreme Court expressly rejected the argument advanced by the State, finding that there was no such motive for killing Ralph Harris, Jr. State v. Huertas, 51 Ohio St. 3d 22 (1990), 26, n.4.

Moreover, the argument advanced by Petitioner that the defendant's knowledge of the victim's family is permissible inquiry was fully addressed by this Court in Booth v. Maryland, 482 U.S. at 505.

> It is true that in certain cases some of the information contained in a VIS will have been known to the defendant before he committed the offense. As we have recognized, a defendant's degree of knowledge of the probable consequences of his actions may increase his moral culpability in a constitutionally significant manner (citation omitted). We nevertheless find that because of the nature of the information contained in a VIS, it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner.

The fact that Respondent knew the victim's family did not increase his moral culpability in any manner to justify the admission of the victim impact evidence.

This case falls squarely within the dictates of Booth v. Maryland and South Carolina v. Gathers. These cases control the decision reached below, and the State of Ohio advances no argument to justify a contrary conclusion.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PROBATION DEVELOPMENT SECTION

ADULT PAROLE AUTHORITY

UNIT ADDRESS 226 Middle Avenue, Elyria, OH 44035

INVESTIGATION

(X) PRESENTENCE

( ) POSTSENTENCE

Docket No 32753

County Lorain

Presiding Judge
Honorable Floyd D. Harris

Defendant EDIBERTO (NMI) HUERTAS aka Eddie Asencio

Address Lorain County Correctional Facility
9896 Murray Ridge Rd.
Elyria, OH 44035

Legal Residence 503 West 20th Street
Lorain, OH 44052

Defense Counsel
Jack Bradley
520 Broadway, 2nd Floor
Lorain, OH 44052

Prosecuting Attorney
Jonathan E. Rosenbaum
Assistant Co. Prosecutor
226 Middle Avenue
Elyria, OH 44035

Education 12th grade

Age 27 Date of Birth 4-1-59

Dependents Five (5) children

Michael B. Willets
Investigating State Probation Officer

Citizenship United States

Soc. Sec. No 295-64-2149

Date Assigned 2-17-87

FBI No. 729 722 R5

Date Dictated 2-23-87

BCI No A 897 966

Follow-up Date 3-10-87

Detainers or charges pending None.

Date Typed 2-23-87

Codefendent's (Disposition or status of case): None.

Disposition

Date

OFFICIAL VERSION

Court Data

INDICTMENT:
Ct. I: Aggravated Murder
Ct. II: Aggravated Murder with Specification
Ct. III: Aggravated Burglary with Specification

DATE OF VERDICT: 2-13-87

VERDICT: Guilty as to amended indictment

STATUTORY PENALTY: Ct. I, Ct. II: life with no parole, with 20 full years and/or $25,000 maximum fine; life with no parole, with 30 full years and/or $25,000 maximum fine; or death on both counts.
Ct. III: 5, 6, 7, 8, 9, 10 to 25 years and/or $10,000 maximum fine (minimum may be actual)

OHIO REVISED CODE:
Ct. I: 2903.01(A)
Ct. II: 2903.01(B)
Ct. III: 2911.11(A)(3)

AMOUNT/TYPE OF BOND: None set

DAYS IN CUSTODY: Been in custody since date of arrest 6-7-86

DAC 2000 APA 221 (8/82)

DETAILS OF THE INSTANT OFFENSE:

According to the official records of the Lorain County Prosecutor's Office and those of the Lorain Police Department, that on 6-8-86, at 3:20 PM, Patrolmen Wargo of the Lorain Police Department stopped at St. Joseph's Hospital performing routine police work. At that time, he observed that there was a person that had just been admitted for a serious stab wound to the abdomen. It was learned that the victim was a Ralph Harris Jr., age 26, of 3048 Toledo Avenue, Lorain, Ohio. He was brought to the hospital by an Elba Ortiz, age 24, of 1919 G St., Lorain, Ohio.

The above, Elba gave the following information: Elba stated that she has had two children by the above Huertas, but have never lived together. Last November, 1985, Elba broke up with Huertas and started to date other men. About two weeks ago, Elba met Ralph Jr., who she had known in high school and started to date Ralph Jr. On this date, Elba and Ralph had gone out and had come over to her residence at 1919 G Street, where Ralph Jr. was to stay the night. While Ralph Jr. was over the house, the above Huertas called the house by telephone and wanted Elba to start seeing him again. Elba told Huertas that she did not want to see him anymore and further stated that she was seeing the above Ralph and that Ralph Jr. was over the house. At this point Huertas started to argue with Elba and then the telephone was hung up.

Elba then stated that while Ralph Jr. and her were in bed, they heard the side door of the house open up. Ralph got out of bed and went to the hall where he could see the side door, which is located on the east side of the house. At this point both Ralph and Elba observed Huertas inside the house, with the side door completely open. Elba ran to the bedroom while Ralph Jr. stayed in the hallway. Elba stated that before she went into the bedroom, she did observe Huertas holding a knife and pointing the knife at her and Ralph Jr. After Elba entered her bedroom, she locked the door and heard Huertas and Ralph Jr. struggling outside in the hall. After a few minutes, Elba heard Huertas say that he had gotten Ralph Jr. and now he was going to get Elba. Huertas then started to bang on the door, doing damage to same to try to enter the bedroom, but Ralph Jr. was able to stop Huertas, who then left the house.

After the above Huertas left the residence, the above Elba came out of the bedroom, carrying a large stick for protection and found that Ralph Jr. had been stabbed. Elba then assisted Ralph Jr. to his auto, which is owned by Ralph Sr., and transported Ralph Jr. to St. Joseph's Hospital for medical treatment.

The police officer talked further with Elba, who stated that the name that Ralph Jr. had given the officer, is the same person, being Huertas. Apparently Huertas had used the name Asencio while as a juvenile, but had legally changed the name to Huertas when he turned 18 years old. She also denied giving Eddie Huertas a key to her residence. On June 16, 1986, Elba Ortiz was given a polygraph examination at Richfield Office, Bureau of Criminal Identification and Investigation regarding her statement. According to the results, it was felt that she told the substantial truth during the tests.

Due to the serious stab wound to the abdomen, the victim was being prepared for surgery. The Emergency Room doctor, Dr. Omley, related that the victim was clear

headed and that the police officer could talk to him for a few minutes. The statement was taped. Ralph stated that Eddie was talking to Elba on the phone. Eddie was telling Elba that he wanted her back. Ralph stated that he heard this as Elba was on the phone with Eddie. Shortly after Elba hung up the phone, Ralph heard someone coming in the door. As Ralph got out of bed, he turned the corner and Eddie was coming at him. Ralph looked up and Eddie went crazy or something. Ralph turned around and Eddie cut him. Ralph stated that he did not see the knife until Eddie drew the knife back. After Ralph was stabbed, he related that Eddie went after Elba. Eddie then went after Ralph and tried to stab him again. Ralph identified his attacker as Eddie Asencio (Huertas). He related that Eddie's mother lives on 20th Street someplace. Ralph stated that he has known Eddie since high school days as they went to school together. He also related that he knew that Eddie had dated Elba before. Ralph related that he had just arrived back in Lorain from overseas on May 25, 1986. Ralph Harris Jr. was taken into surgery, where he remained until 13:30 hours. At 14:00 hours, the hospital staff advised police that he had died. According to the records of Dr. William Kishman, Lorain County Coroner, the records reflected that the cause of death was a stab wound of the liver and portal vein. He ruled it a homicide.

Lorain Police Department Officers, along with Lorain County Sheriff's Department, went to 700 Glenn Oaks Apartments and found the defendant's car parked there. The officers went to Huertas' residence, Apt. 114A, and Huertas answered the door. He was advised that he was a suspect in a stabbing. He was transported to the Lorain Police Department for questioning and was later arrested for the murder of Ralph Harris Jr.

VICTIM'S STATEMENT:

This writer contacted the victim's parents, Mr. and Mrs. Ralph and Elizabeth Harris Sr., 3048 Toledo Avenue, Lorain, Ohio, on 2-17-87, during a home visit. Mr. and Mrs. Harris told this writer that they knew the defendant, because he used to come over to the house with other friends. They stated they had raised their son to respect others and to go to church. He was the best out of the group. They felt that Elba deceived the victim, by writing him and promising that the defendant was out of the picture. However, what they heard was that Elba was still seeing the defendant. While showing pictures of the victim, their son, the victim's parents stated they are tired of rehashing over the details and wished that people would leave them alone. The father stated that since his son's life was taken, that the defendant deserves to get the death penalty. The mother, who explained that she is very religious, feels that God has the only right to punish the defendant, and that the Court should do what it has to do. They explained that their son was in the military and that they took care of the funeral arrangements, hospital bills and etc. That the only loss of money they suffered was the towing of the father's car and also the loss of a camera from the car. While the car was being towed the father found the camera in the trunk and when he picked up the car, the camera case was empty.

Elba Ortiz, 1919 G Street, Lorain, Ohio, interviewed by this writer on 2-18-86, gave the following statement regarding her relationship with the defendant and the victim and her involvement in this case. She stated that she knew the defendant for approximately 9½ years and that she had two children from this relationship.

She also knew the victim, because he would come over to see the defendant and her. Approximately two days before the victim came home on leave, she told the defendant to leave and that she wasn't going to see him anymore. She stated that the victim told her of the defendant's past and current unfaithfulness. She felt that her relationship with the victim started out as friendship, then became more serious. While they, Elba and the victim, were in bed, both heard something or someone come into the house. The victim turned on the bedroom light and started to leave the room, when a knife came around the doo.. She then heard "You got me Eddie" and then she heard Eddie say "I got to get Elba". She tried to force the bedroom door, but it was stuck. Next she heard a noise, this is where she felt the victim throw a fish stand at the defendant and it was then quiet. She came out of the room and brought her child back into the house. She asked the victim where he was hurt and saw a large amount of blood coming from under his hand. He told her to call the police, however she did not remember the phone number. At this time, the victim told her to get the keys from his shoes and drive him to the hospital. She did this and he finally collasped at the hospital. She stated that the defendant did not have a key to her apartment. She also stated that she felt they were going to fight sooner or later, however, didn't feel that the defendant was going to kill the victim. She felt that the defendant appeared drunk, however she did not exactly explain when and how she saw him the night of the murder. She pictured Eddie as a drinker on the weekends, to the point of what she felt was a blackout. However, when she told him that she wasn't going to see him anymore, he started to drink all the time. In closing, she does not report any restitution in this case. However she doesn't feel he should get the death penalty.

DEFENDANT'S STATEMENT:

The defendant gave the following statement to the Lorain Police Department during questioning on 6-8-86. Ediberto was brought to the Detective Bureau where he was interviewed. He was given the standard departmental Miranda Waiver Form and asked to read it. A police officer also read it out loud to him. He was asked if he understood to which he stated that he did. The police then explained each point again and advised him that he could be facing very serious charges. He again stated that he understood his rights. He then signed the standard departmental waiver form.

Ediberto was asked forhis personal information, age, social security number, etc. He used the name Huertas. He was asked if he went by any other names. He related that when he was in high school, he used the name Ediberto Asencio. He stated that this was because he moved to New York to his grandmothers. After getting out of high school, he then used his parental surname of Huertas.

He said that most people know him as Eddie. He was asked who would know the name Asencio. He stated that after school he never used Asencio and the only ones that would know this name would be friends from school.

Ediberto was asked to explain his agenda for Friday evening up until the police arrived at his door. He related that earlier in the day, he made arrangements with a girlfriend named Christina to go out in the evening. At first, Ediberto

related that he and Christina went to the Hide Out Bar at Amherst Plaza. There, he saw his room mate, Daniel Lopez. He did not realize that Daniel did not go to work. He decided that he was going to drink with Daniel. The two then dropped Christina off and went bar hopping. Later, Ediberto changed the beginning of the story. He related that that story is what the two men told Christina so he could get away from her without hurting her feelings. He stated that the date was made with Christina. He found out Daniel was not going to work and the two decided to go out together. Prior to Christina's arrival, they made the story up that Daniel would find them and claim there was family problems and Ediberto had to leave.

Ediberto related that he and Christina drove to Ediberto's place using her car. There, Daniel returned using his car. After approximately fifteen minutes, Christina left and Daniel and Ediberto went out drinking. Ediberto related that the two left the residence in Ediberto's car with Daniel driving. The two then went to the Galeon Bar on Erie Avenue. After that, the two went to Tony J's Bar on E. 28th Street, where they stayed until the last call was made. At that time, the two then drove straight home.

Ediberto was interviewed and then Daniel was interviewed and again Ediberto was interviewed. Ediberto was told at the end of the first interview that the police would talk to Daniel and then finish the interview with him.

During the second interview, Ediberto was told that the story about where the two were drinking were different. He related that he remembered that the two left Tony J's and went back to the Hide Out. When they arrived there, the management was calling "last call". The two then left Amherst Plaza and drove straight home. This took about fifteen minutes.

During the second interview, Ediberto was told that Daniel stated that the two used Daniel's car for the evening. Ediberto stated that that was not so. He maintained that the two used Ediberto's car with Daniel driving. He was told that Daniel stated that the bars entered was opposite as to what Ediberto said. Ediberto maintained the two went to Galeon first, Tony J's second, and then the Hide Out.

Ediberto was advised about Ralph's condition at the time he was interviewed. He was also asked if he had stabbed Ralph. Ediberto denied both calling and stated that he was never around Ralph, nor Elba. Ediberto at one point related that Ralph and Elba went to Cleveland to a concert and were gone most of the evening. Ediberto was asked as to how he knew Ralph. He stated that the two of them were friends and that they had gone to school together. He was aksed if he had seen Ralph since he came home on leave and whether they talked about Elba. Ediberto said that he saw Ralph twice and they did talk about Elba.

He stated that he told Ralph that he was his best friend and that what he was doing was wrong. He stated that Elba was "vulnerable" and that Ralph should not see her. Ralph told Ediberto that the decision was Elba's to make. He also said that when Ralph returned to Korea that Elba would come back to him.

Ediberto was asked about the incident where his children were locked out of Elba's house. He stated that he let them in and did not take them home as his girlfriend was living with him and he did not want the children to see this. He stated that he never had the key to the house, but found the kitchen window unlocked and entered that way. When the two girls arrived home, he left them in and left.

Ediberto related that Elba called him the morning after the girls had been locked out and talked to him at 3:00 in the morning. He stated that he went to her house and stayed with her on Monday. He related that Elba left for work and shortly later he left. Elba was asked about this and she denied allowing Ediberto to come to her house at all.

He stated that he and Elba talked about her feelings towards him. He stated that she said she was mixed up and confused. This was the reason he talked to Ralph. Elba stated that at one time she talked to Ediberto about being mixed up and stated that she told Ediberto that she was staying with Ralph. She stated that she and Ediberto had been together on and off for about 9 years, but he was married, and this is what came between them. He went back to his wife.

When Ediberto was interviewed he was asked permission to search his car. He was advised that he did not have to permit this. He was given a departmental waiver form for a Consent to Search. He stated that he had no objections and permitted the search. He signed the Consent to Search.

Ediberto was asked again about Ralph and his being stabbed. He was told that he had been identified. He stated that he was with Daniel all evening, and that after leaving the Hide Out, he went straight home and "crashed out on the couch". The next thing he remembered was the police at the door.

Ediberto's car was impounded at Fritz's Garage. It was searched. In the rear area of the car (the car is a hatchback) was found a pair of Pro Keds tennis shoes. On the right shoe, there was a red substance on the bottom and outer edge. The shoes were confiscated and where sent to the lab for examination.

The defendant, Ediberto Huertas, submitted the following written statement regarding his involvement in the present offense:

"I stabbed my good friend, Ralph Harris. I had been seeing Elba Ortiz for 9 or 10 years and have two children with her. Ralph started to see Elba and I found out he was spending the night with her. I was intoxicated and very upset and I went over to Elba's house and stabbed Ralph. I am not sure why I did this because I know that Ralph did not deserve it."

The defendant gave the following verbal statement regarding his involvement during an interview at the Lorain County Correctional Facility on 2-19-87:

He stated that a girl he knew as Chris called him around 7 or 8 PM and started to discuss going out to the Hide Out Bar. She indicated that she would pick him up. After this time the defendant's roommate, Danny Lopez, came in to the apartment. At this time both started drinking while waiting for Chris's arrival. The defendant then convinced Danny to stay home from work and that they would go out bar hopping. He then told Danny to call the bar and give a false story so that he could break his date with Chris. While the defendant was at the bar with Chris, Danny came to the bar with a message that one of the defendant's family was at the hospital. Chris took the defendant home, where the defendant and she stayed for about a half hour. After she left, the defendant and his roommate, Danny,

left to go to several bars. They came back at the apartment where the defendant did some cocaine. At that time the defendant called Elba, regarding another chance. Elba said no. The defendant asked if she was with Harris. The defendant said "I guess we're even that I made love to his wife". The phone was hung up by Elba. The defendantcalled again and the phone was hung up. He started to get angry over that Elba and he promised to use the bed only between them and the fact of his two kids. He then went over to her house and noticed Harris' car in Elba's driveway. He went into her house and got into a scuffle with Harris. Ralph said "You got me". He tried to get into Elba's bedroom door by kicking it. The defendant related that he does not remember really anything about the evening other than going out with his roommate, drinking/using drugs, then the police questioning him. However, he has heard what testimony was at the trial, other statements, and some things that he is remembering. He stated that he did not go over to the house with the intention of stabbing Ralph but his main purpose was to confront Elba. He told of knowing the victim since 1973-74 in high school and they they were good friends. The defendant knew Ralph was seeing Elba. This was due to Elba telling him that she was going to stop seeing him and start seeing Ralph. He went to see Ralph to tell him he was going to get hurt over this relationship. He knw Ralph was very sensitive and Elba would end up hurting him. The defendant stated that he is sorry for what had happened, that a life was taken, and he did not intend to kill him or her.

PRIOR RECORD:

Juvenile.

According to the records of the Lorain County Juvenile Court, the defendant has the following record as a juvenile.

Date	Offense	Place	Disposition
6-24-76 (17)	Criminal Trespass	Lorain, OH	7-13-76 unofficial hearing, placed on guidance.

On 5-2-76, the defendant along with a Hector Perez, age 16, were found inside a trailer at Sandy's Trailer Sales, West 36th and Broadway, Lorain, Ohio. Found in the defendant's pocket were keys to a new motor home parked on the lot. The defendant also had a 3" razor in his pocket.

11-30-76 (17)	Assault	Lorain, OH	3-8-77 official hearing had with father present. Driving rights suspended for 30 days. Defendant admonished. Released from guidance on 7-1-77 due to the defendant turning age 18.

On 10-13-76, the defendant struck a Ricky Hall, age 16, in the mouth. The victim was then thrown to the ground by a second assailant known to him as Carlos. The victim was then kicked, although in the confusion he was unable to determine who was kicking him as three other youths were said to have been present. The defendant, after first denying his involvement, finally admitted that he did fight with the victim, Hall, and hit him first.

Institutional/Supervision Adjustment:

The defendant was first placed on guidance on 7-13-76 for charges of Criminal Trespass. As part of his probation, he was ordered to 1) stay away from Hector Perez; 2) maintain a 10:00 PM weekly curfew, 12:30 AM on weekends; 3) listen to his father; and 4) call his probation officer once a week. His probation was continued due to the 11/76 Assault. On 7-1-77, the defendant was released from guidance due to having turned age 18. The prognosis upon release was termed as being fair, no further adjustment information was available.

PRIOR RECORD:

Adult.

Checks made with the FBI; BCI; the Lorain County Sheriff's Department, Elyria, Ohio; the Lorain Police Department, Lorain, Ohio; and the Elyria Police Department, Elyria, Ohio; revealed the defendant has the following prior arrest history.

Date	Offense	Place	Disposition
6-22-77 (18)	Attempt to Commit Breaking and Entering (M-1)	Lorain, OH	10-14-77 pled guilty to reduced charges, Lorain Co. docket #20451, originally charged with Complicity to Aggravated Burglary. Sentenced six (6) months Lorain County Jail, six (6) months suspended. Fined $250.00 and costs. Good Behavior for one (1) year.

On 6-22-77, the defendant aided three codefendants (Hector Perez, David Carroll, and William Galendez), in a burglary of a home located at 3961 Gary Avenue, Lorain, Ohio, took a TV set and some stereo equipment.

2-7-78 (18)	Ct. 1: Disorderly Conduct; Ct. 2: Obstructing Official Business	Lorain, OH	Ct. 1: $200.00 fine, $150.00 suspended; Ct. 2: $125.00 fine, $100.00 suspended.

No details available.

10-11-78 (19)	Carrying Concealed Weapon	Lorain, OH	Sentenced 30 days jail, 25 days suspended; Good Behavior one year.

On 10-11-78, while along with a codefendant, Cardona, the defendant was found to have on his person, a stilleto-type knife (switch blade).

9-24-82 (23)	Ct. 1: Criminal Mischief; Ct. 2: Assault	Lorain, OH	Ct. 1: 10 days jail on condition of restitution and good behavior for one (1) year; Ct. 2: originally charged with Felonious Assault, $50.00 fine and costs, 30 days/25 days suspended. Good behavior for one (1) year

On 9-17-82, the defendant, while at the Citgo Gas Station, 4820 Broadway, Lorain, Ohio, attempted to knife a Mark Schrull. The defendant also kicked the rear driver's side door of the victim's father's car.

Date	Offense	Place	Disposition
8-3-84 (25)	Open Flask	Lorain, OH	Fine waived.

No details available.

Other Convictions:

The defendant had four (4) traffic violations between 1983 to 1985, for which he was fined.

Dismissed/Nolled, and Unknown Disposition Charges:

The defendant was charged with DWI, Failure to Control, No Driver's License, No Helmet on 4-27-86 in Lorain, Ohio. According to the Lorain Municipal Court's records, the above case was dismissed with a right to refile should he be released from current county charges.

Pending Charges:

None known.

Prior Institutional/Supervision Adjustment:

None known.

SOCIAL SUMMARY:

The defendant was born on 4-1-59 in Bronx, New York, the oldest of two children born to Jose and Carmen (nee Reyes) Huertas. The defendant reported his family as follows:

Jose Huertas, father, deceased.

Carmen Julie (nee Reyes) , mother, age 50, 224 Bend Street, Brooklyn, New York.

Yvette Rodriguez, sister, age 25, resides in New York.

The defendant stated that his parents married and that they divorced when he was 3 or 4 years old. At age 5 the defendant started to reside with his grandparents, Rafael and Migulina Ascencio. In 1969, the defenant and his grandparents moved to Lorain, Ohio. The defendant stated that he assumed his grandparents were his parents

and that at age 17, he learned from other sources, who his real parents were. He confronted his grandparents and was told the truth. He had contact with his mother and father and told of one occasion where he fought with his dad. The defendant reports that he father died from a knife wound four or five years ago. This writer contacted the defendant's grandparents and mother on 2-20-87. This interview took place at the home of Mr. and Mrs. Rafael Asencio, 503 W. 29th Street, Lorain, Ohio.

The defendant's mother, Carmen, was interviewed first. She stated that she never married Jose Huertas and she gave the defenant to his grandparents to raise for unknown reasons. She later married an Efrain Jaime. They had two children, Minerva (age 20), Efrain Jaime Jr. (age 19) from this union. She related that she married Jaime twice and divorced him twice. She stated that her ex-husband suffers from mental illness. In regards to the charges, she felt that the Court is discriminating due to the fact that they are only hearing bad things regarding her son and the Court did not allow the psychological and/or drug evaluation which would help in understanding what had happened. This officer also interviewed Mr. Rafael Ascencio, who is the defendant's grandfather. He stated that they took the defendant at birth and he was raised in their home and the defendant's mother lived with them. He reported that he was raised in a very good home and was treated like their own child. He reported not knowing of any drug or alcohol usage until approximately a year ago, when the defendant was arrested for DWI. Mr. Asencio feels bad over what happened, as he knew the victim. He related that Harris would come over to spend time with the defendant and the Asencios. He believes the defendant does not know what happened and wishes that the Court try to understand him.

The defendant reports that he had two children, Melinda (DOB 1-21-78) and Shamqua (DOB 1-9-79) from a relationship with Elba Ortiz. He states that he pays $50.00 a week in child support. The defendant reports that this relationship has been on and off for approximately 9½ years. Other than an interview presented earlier in this report by Elba, she stated that she is still in love with the defendant. When asked if the defendant ever beat or threatened her, she stated no. However, a Lorain Police report dated 2-9-80 reflected that she filed a report stating that Huertas beat her about the face with his fists. This writer could find no record of formal charges ever being filed. The defendant related that with Elba, it was an on and off again relationship with frequent arguments, and according to the defendant, their relationship was based on sex. The defendant stated that he has three (3) children, Raquael (DOB 2-20-82), Nicole (DOB 8-12-83) and Ediberto (DOB 7-17-85) from a relationship with an Arlene Marrera. This relationship occurred from 1980 through 1985. This writer interviewed Arlene Marrera on 2-20-87, at 1980 E. 30th Street, Lorain, Ohio. She stated that she and the defendant legally married (common-law) on 11-11-82, at the Lorain County Welfare Department. She felt that the defendant was a good provider and during their relationship Elba started coming around the home making advances to the defendant. She learned that the victim was corresponding with Elba and that prior to the murder, Ralph came over to her home and talked to her. He stated that he was seeing Elba but had no serious plans with her. The defendant also talked with Arlene regarding Harris seeing Elba, that Elba put their relationship on hold until Harris returned to the service. He did not appear to be angry, just confused. She also told of the threats and harassments that Elba had said to her and explained that it still continues as of this date. The relationship between Arlene and the defendant ended in separation,

mainly due to Elba's involvement. She also reports that the defendant only used alcohol casually when he was residing with her. However, she stated he started using other drugs when he was with Elba.

The defendant attended Admiral King High School, 2600 Ashland AVenue, Lorain, Ohio from 9/73 to 12-16-77. He entered there while in the 9th grade and left due to overage while in the 12th grade. His grades could be rated as average to below average. He was administered the Lorge Thorndike IQ Test while in the 9th grade, and his IQ score was rated at 101. No other information was provided by the above school officials. The defendant reports that he left school after he was skipping too much school. However, a family member states that it was due to his girlfriend pending the birth of their first child. The defendant stated that in 1984, he obtained his GED from the Elyria Board of Education, under the direction of the Lorain County Ceta Program. The defendant also reports that in 1985, he attended Airco Technical Institute, 1361 E. 55th Street, Cleveland, Ohio, for a period of six (6) months. He stated that he received a certificate in welding. Inquiries were sent to the above two programs and the appropriate agencies have not yet returned this information as of the date of this report. However, this writer was advised by Mr. Rafael Asencio, the defendant's grandfather, that he has the above two certificates in his possession. The defendant stated he was never in the military service.

The defendant is a 27 year old, Hispanic male, who is 5'7" in height and weighs 150 pounds. He has brown eyes and brown hair and states he has no identifying marks, scars, or tattoos on his person. The defendant rates his current health as good, stating he suffers from an old football injury to his knee. The defendant also reports that in 1986 he was involved in a motorcycle accident, which resulted in back injuries. He stated that he has used alcohol to excess. He also reported using marijuana, acid, cocaine, PCP, and speed. He stated that near the time of the instant offense he was drinking a six pack a day, plus rum, and also using other drugs. He states he has a problem with both drugs and alcohol and reports suffering from blackouts. The defendant was examined by Dr. Thomas Haglund, W.G. Nord Center, 6140 South Broadway, Lorain, Ohio on 9-26-86.

This psychological report was due in conjunction with the defendant pleading insanity at the time of the instant offense. The findings/conclusion of Dr. Haglund's report are as follows:

"Conclusion: Based on the clinical interview with Mr. Huertas and a review of investigative reports completed by Patrolman Wargo and Stack and Detectives Schuster and Poli of the Lorain Police Department, it is the examiner's opinion that, at the time he stabbed Mr. Harris, Mr. Huertas was not legally insane. The basis for this opinion lies in the absence of any mental disease or defect that would have impaired Mr. Huertas' appreciation of the wrongfulness of his actions and/or his ability to refrain from committing the act. There is no clinical evidence that, at the time of the offense, he was experiencing a psychosis and related symptoms such as delusions or hallucinations that would have driven him to kill Mr. Harris or would have grossly impaired his judgment. The key ingredient in this killing appear to have been his alcohol and drug intoxication combined with

a goodly amount of emotional arousal triggered by his earlier conversation with Elba Ortiz. Added to this was a build-up of tension and frustration over a period of a couple of weeks about the fate of this unstable and conflicted relationship, one which had dragged on for a number of years. The result, when combined with drugs and alcohol, was the tragic but all-too-familiar 'crime of passion'."

Another report regarding ORC 2929.03 Imposition of Sentence in Capital Case was ordered by the Court on 2-13-87. Dr. Haglund, of the Walter G. Nord Center, is compiling this report and will be presented to the Court on 2-23-87. The defendant has never been a patient in an institution for the mentally ill.

The defendant indicated that all of his financial assets have been sold to pay for his attorney. Aside from a grant of $2,500.00 to Airco Technical Institute, the defendant reports no other financial obligations.

EMPLOYMENT:

6-7-86 to Present: The defendant has been incarcerated at the Lorain County Correctional Facility, 9896 Murray Ridge Road, Elyria, Ohio 44035.

5-8-85 to 6-12-86: The defendant was employed at Ferrous Metal Processing Inc., 11103 Memphis Avenue, Cleveland, Ohio as a first helper - back end slitter. He earned $9.00 per hour and was terminated due to excessive absenteeism. According to company officials, they stated that following regarding the defendant: "Eddie was a reliable person who caught on to tasks well. In general he was a good employee." They also indicated that they would not consider re-employing the defendant.

4/84 to 11/84: The defendant reports employment at Cloverdale Farms, 226 Conneticut Ave., Lorain, Ohio as a laborer. He stated he earned $3.50 per hour and that this employment was through Kelly Services, 1710 Cooper Foster Park, Lorain, Ohio. This officer visited both employers who had no record of the defendant being in their employ. The subject states the he left the above employer when he went to technical school.

4-19-82 to 10-1-82: The defendant was employed at Green Circle Growers Inc., 10310 E. River Road, Columbia Station, Ohio as a laborer in a greenhouse. According to a company spokesman, the defendant was fired from this job due to poor attitude and fighting on the job. The defendant stated that he got into an argument with a fellow employee and was dismissed.

1983: The defendant reports employment for approximatley six (6) months with A.R.A. Food Services, c/o Ford Motor Company, Baumhart Road, Lorain, Ohio as a food service worker. He stated that he earned minimum wages and was fired when he got into a fight with a fellow employee. This writer contacted A.R.A. officials at the Ford Motor Co., Baumhart Rd., Lorain, Ohio and according to Mr. Mike Garber, he has no record of the defendant being in their employ.

1978 to 1982: The defendant received General Relief and Food Stamps, from the Lorain County Welfare Department during this time span.

1977: For approximately eleven (11) months in this year the defendant reports employment at Servisteel Corp., 4920 French Creek Rd., Lorain, Ohio, as a laborer earning $3.50 per hour. The defendant reported that he was laid off from this employment. An inquiry sent to the above company has not yet been returned to this office as of the date of this report.

Respectfully submitted,

Michael B. Willets
Unit Supervisor
Elyria Unit I 2329

MBW:llo

Thereupon, the State of Ohio, in order to further maintain the issues on its part to be maintained, called ELIZABETH HARRIS as a witness, upon being first duly affirmed, was examined and testified as follows:

DIRECT EXAMINATION OF ELIZABETH HARRIS

BY MR. ROSENBAUM:

Q Will you state your name, again, please, and spell it for the record, Ma'am.

A Elizabeth Harris, E-l-i-z-a-b-e-t-h, h-a-r-r-i-s.

Q Where do you live, Ma'am?

A 3046 Toledo Avenue.

Q Do you work anywhere, Ma'am?

A No, everything that I do is volunteer.

Q Does your husband work anywhere?

A Yes, he was at US Steel; but he -- he went retirement last month.

Q What's your husband's name?

A Ralph Harris, Sr.

Q Do you have children, Ma'am?

A Yes, I do.

Q How many children did you have?

A 3 of my own, 4 adopted.
Q And did you have a son who was also named Ralph Harris?
A Yes, Ralph Harris, Jr.
Q Does he have a son?
A Yes.
Q What is his son's name?
A His name is Ralph Harris, III.
Q How old is Ralph Harris, III?
A 5 years old.
Q Where does he live now?
A He's with his mother part of the time, and part of the time he's with me.
Q Where was he living on June 6th of 1986?
A He was living with me. They sent him to me from Cheyenne, Wyoming.
Q Where is that?
A Cheyenne, Wyoming, is where he was.
Q I'm sorry. How long had he lived with you?
A Oh, about a year, about 2 years.
Q Now, I'm going to ask you to recall the events of a day that occurred the week before your son died.
Did the Defendant come to your home that day?
A Yes.
Q What did he say to you?

A I went to the door; and he asked me could he speak -- first I asked him in; and he said, no.
He said, "Could I speak with Ralph?"
MR. BRADLEY: I object, Your Honor, to this testimony.
THE COURT: Overruled.
Q And what happened after that?
A I called Ralph; and he went to the door; and he went outside with Eddie.
Q Did you overhear the conversation between the Defendant in this case and Ralph Harris, Jr.?
A Yes, I did.
Q Will you tell the Court and Jury what was said at that time?
A At the time, when he came to the house, he asked my son about Elba; and he said he couldn't work that morning, he was disturbed. He left work; and he come back to talk to him because he wanted him to leave his woman alone.
My son told him that that wasn't his woman, his woman was his wife, Arlene; and he says that she was single; and he was single. And Elba was not his woman.
So, he told him he wanted him to leave her alone; and so my son told him that he had a right to be with her; so, he told him that he leave her alone or he was going to have to waste him, but he hated to end their friendship

that way.

So, my son told him -- he squished his shoulders -- shoulders up; and he said -- oh, Jesus, Jesus.

Q What did your son say to him at that time, Ma'am?

A He told him that, "You know where I live;" and turned around and came into the house.

Q So, at that time you heard the Defendant acknowledge his friendship to your son; and he wasn't going to let that stand in the way of killing him, was he?

A No.

Q Did he later come back that day, the Defendant, to your home?

A Yes.

Q What happened at that time?

A He wanted -- I went to the door again.

And he said, "I want to talk to Ralph just one more time."

And so, Ralph -- he told him okay. And he walked on out again.

So, he said to him that Elva said she didn't want to see him any more. So, then Ralph told him, says, "Well, Eddie, she will have to tell me herself."

And he says, "Well, it doesn't seem like you're going to give up. I still say I have to waste you."

Oh, why did he do it, Lord? Why did he do it, Jesus?

Q Mrs. Harris, can you recall if he said anything about how he rights, Ma'am?

A He told him, "And you know I don't right fair." He says, "I'm going to have to waste you;" and he got in his car and took off.

Oh, Jesus, Jesus, Jesus.

Q Ma'am, were you proud of your son, Ralph Harris, Jr.?

A Oh, God, how proud I was, a child that never give me no problem, no nothing, no drinking, no smoking, nothing but go to church and come back and do his Army, work out for karate.

Oh, God, no dope, no nothing; and he wanted to be something.

Q Does Ralph Harris, III miss his father?

A Oh, God, yes. I hate to take him to the graveyard. He always wants to go. He think he going to see his dad. Oh, dear God, please help us, help us, Lord, Jesus.

MR. ROSENBAUM: I have no other questions, Your Honor.

A Jesus.

THE COURT: Do you want to take a drink of water, Mrs. Harris?

A Oh, what a good kid. Oh, Jesus, help me. Please help me.

CROSS-EXAMINATION OF ELIZABETH HARRIS

BY MR. BRADLEY:

Q Mrs. Harris, can you answer a few questions from me?

A I'll try.

Q Mrs. Harris, you know this boy, too, don't you?

A Yes, I do.

Q You have known this boy for a long time, haven't you, Mrs. Harris?

A Yes, I do.

Q Mrs. Harris, Mr. Asencio came into this Courtroom and said that he felt that your son, Ralph, was like a son to him.

Did you know he felt that way about Ralph?

A Yes, because my son cared a lot about them.

Q Did you know that it hurt Mr. and Mrs. Asencio?

MR. ROSENBAUM: Your Honor, I object to the relevancy of this; and this is also rebuttal.

MR. BRADLEY: This is cross-examination, Your Honor.

THE COURT: Overruled.

Go ahead.

A Oh, Dear Lord.

Q You know, Mrs. Harris, how much it hurt Mr. and Mrs. Asencio for what their son did to your son, don't you?

A Yes, I know what they told me.

Q And Mrs. Harris, you ask yourself every day why this

happened between Eddie and your son, don't you?

A Yes, I do.

Q It's hard to figure out, isn't it?

A Yes.

Q You didn't think that this boy was capable of doing that, did you?

A No, I didn't think he would do it, anything to Ralph because they all looked up to him for karate and teaching karate and all of this.

Q And Eddie looked up to Ralph, didn't he?

A I thought he did.

Q They were good friends, weren't they?

A I thought so.

Q But, Mrs. Harris, Elba came between that friendship, didn't she?

A I would -- I guess, yes.

Q And Elba deceived your son, didn't she?

A She deceived me.

Q She deceived you?

A Yes, my son is not here to know.

Q But she did deceive you, didn't she?

A Very much so.

Q She deceived you because she indicated that her and Eddie had been broken up for a long time, didn't she?

A Yes.

Q And she lied about that, didn't she?
A Yes.
Q But you believed Elda?
A Yes, I did.
Q And you know, Mrs. Harris, that things may have been different if Elda hadn't lied, isn't that right?
MR. ROSENBAUM: Objection, Your Honor. She doesn't know.
THE COURT: Sustained.
A I don't know.
MR. ROSENBAUM: Speculation.
A I don't know. I don't know.
Oh, Dear Lord.
Q I know this is hard for me to talk to you about this. I know you don't want to talk about it any more, but, Mrs. Harris, you went and answered that door when Eddie came back, didn't you?
A Yes, I did.
Q Mrs. Harris, you didn't ask Eddie, Eddie, why did you threaten my son, did you?
A No, I did not ask him that.
Q Mrs. Harris, you didn't ask him because you didn't think his threat was serious, did you?
A Yes, I did, because I had heard before my son got here that he was going to kill him in Lorain.

Q I'm sorry?
A I heard before he got -- my son arrived that he was going to kill him if he got in Lorain.
That was already in Lorain.
Q Prior to Ralph --
A Before all of this.
Q Prior to Ralph even coming home from leave?
A That was in Lorain before Ralph ever got here from Korea.
Q That's rumors that you heard?
A That was rumors.
Q Well, Mrs. Harris, Elda testified that there was nothing between her and Ralph until he had been home an entire week?
A Well, I don't know nothing about whatever was said because the things she said is so different since we have been in Court until -- I don't know.
Q She has told a lot of different things, hasn't she?
A Yes, indeed.
Q Mrs. Harris, did you know that Ralph and Eddie had met at Elda's place?
A No, I didn't, because --
Q You didn't know about that, and that they had shook hands over there?
A I did not know anything about it.

Q But you didn't say anything to Eddie when he came back about why he had threatened your son?
A No, I didn't.
Q Where is Ralph, Jr. living now, Mrs. Harris?
A Ralph Jr.'s in the grave.
Q I'm talking about --
A Ralph, III is his son.
Q Where is he living now?
A He is with his mother part of the time, and he's with me.
Q Where does she live?
A Root Road with her mother since this has happened.
Q You are having some problems with her also, aren't you?
A Not a problem that I can't handle.
Q But, there is a problem?

MR. ROSENBAUM: Objection.

THE COURT: Sustained.

Q Mrs. Harris, you have indicated to Mr. Rosenbaum; and you have indicated to Mr. Willets, that you don't want Eddie to get the death penalty, haven't you?

MR. ROSENBAUM: Objection.

THE COURT: Overruled.

A I told Mr. Rosenbaum that I am not the Judge and I'm not the Jury; and it's left up to the Courts.

Q But you don't want him to get the death penalty, do you?
A And God; and that's what I mean.
Q But you don't want him to get the death penalty, do you?

MR. ROSENBAUM: Your Honor, she answered the question.

THE COURT: Sustained.

Q Did you answer my question, Mrs. Harris?
A Yes, I did.
Q Mrs. Harris, did you think of Eddie Huertas as a son, also?
A Yes, I thought of all of them the same way.
Q They were all that close?
A because I loved all the kids that was at my house.
Q As a Christian, you have the ability to forgive?

MR. ROSENBAUM: Objection.

THE COURT: Well, overruled.

Go ahead.

A As a Christian.

MR. BRADLEY: Thank you, Mrs. Harris.

REDIRECT EXAMINATION OF ELIZABETH HARRIS

BY MR. ROSENBAUM:

Q Did you answer, ma'am? Were you done? Was that your whole answer?

A Beg your pardon?
Q Was that your whole answer to his question?
A As a Christian. That's what I said.
Q All right.
Ma'am, does it hurt the Asencios like it hurts you?
MR. BRADLEY: Objection.
A It couldn't have.
MR. BRADLEY: Speculation, Your Honor.
THE COURT: Overruled.
MR. ROSENBAUM: Well, he asked if she knew how much it hurt them; and I just wanted to follow that up.
THE COURT: Go ahead.
A What did you say?
Q Mr. Bradley asked you if you knew how much the Asencios hurt for the loss of your son. Now, I'm asking you: Do they hurt like you do?
A No, they can't, because they still have Lucie; and I don't have Ralph.
MR. ROSENBAUM: I have no other questions.
MR. BRADLEY: I have nothing further, Your Honor.
THE COURT: Thank you, Mrs. Harris. You may be excused.
MR. ROSENBAUM: I have one further witness,

Your Honor.

* * *

Thereupon, the State of Ohio, in order to further maintain the issues on its part to be maintained, called RALPH HARRIS, SR. as a witness, upon being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF RALPH HARRIS, SR.

BY MR. ROSENBAUM:
Q State your name, sir.
A Ralph Damon Harris, Sr.
Q Are you the father of Ralph Harris, Jr., who is the victim in this case?
A Yes, sir, I am.
Q Sir, I have one question to ask you.
Mr. Bradley asked your wife if she wanted to see this man get the death penalty for what he did to your son?
MR. BRADLEY: Objection.
Q Do you have an opinion on that?
A Yes.

MR. BRADLEY: Objection.

THE COURT: Overruled.

Go ahead.

Q Do you want to see this man go to the chair for what he did to your son?

A He -- he took a life.

Yes, I do.

MR. ROSENBAUM: I have no other questions.

CROSS-EXAMINATION OF RALPH HARRIS, SR.

BY MR. BRADLEY:

Q Mr. Harris, you feel that way because he took your son's life, don't you?

A (No response).

Q Isn't that true?

A Yes.

Q I mean, that's never happened to me. My daughter has never been taken away from me, but I'm sure I would feel the same way as you do. Okay. I understand that.

MR. ROSENBAUM: Your Honor, I ask that that be stricken.

It's not a question.

THE COURT: Sustained. Go ahead. Just ask a question.

Q Mr. Harris, you understand that it's not your decision in this case?

Do you understand that?

A Yes, I understand that.

Q You can't be the person who gives or metes out justice in this case.

Do you understand that?

A Yes, I do.

Q You understand, Mr. Harris, that this was an incident over a girl?

A It wasn't no incident. He killed him. He came to my house twice.

Q Did you hear that conversation?

A No, I did not. I was --

Q You were cutting the lawn?

A Right.

Q The lawn mower was going?

A Yes.

Q It was a power mower?

A Yes.

Q But you didn't hear that?

A Didn't hear what?

Q The conversation?

A No.

Q Did your wife tell you about it after the first time Eddie was there?

A No, I was -- first time I was in the yard cutting the

grass.
Q So, she didn't tell you that she had heard it the first time?
A Not then, no.
Q Mr. Harris, your wife indicated that this boy was like a son to you and your wife, also?
A Yes, until this happened, yes.
Q Until this happened; but he was like a son?
A I said until this happened.
Q You knew that your son was very close with the Asencios, also?
A I don't know.
Q You didn't know that?
A No, I say I don't know. All I know is after this happened, I met them.
I don't know them personally.
Q You have met them after this happened?
A Yes.
Q And you know that Mr. Asencio feels bad about what happened to your son?
A Yes, he said he did.
Q He can't feel the same way you do?
A No.
Q Because you are his father?
A Right.

Q And you were proud of your son?
A Right.
Q He didn't deserve this?
A That's right. No, he did not.
My son told me, he said, "Daddy -- "
MR. BRADLEY: I have nothing further of this witness, Your Honor.
MR. ROSENBAUM: I have no other questions.
THE COURT: You are excused, Mr. Harris.
A Thank you.
MR. ROSENBAUM: I have no other witnesses and would like to tender my exhibit.
THE COURT. Ladies and Gentlemen of the Jury, you are now going to have an early lunch.
So, would you please report back, then, about, oh, 12:15, 12:20, somewhere in there.
Remember, don't talk about the case. Don't read anything. Ignore anything that you might have read or seen in the press. The reporters are not in the Courtroom throughout the trial; and sometimes their reports are inaccurate.
You just base your opinion on what happens here in the Courtroom. It's all right to dine together, talk together; and I'll see you in a little over an hour.
All right.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment.

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
OCT 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. - 89-1944

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF OHIO

Petitioner,

vs.

EDIBERTO HUERTAS

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OPPOSING MOTION TO DISMISS

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PETITION FOR CERTIORARI
FILED JUNE 11, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

BEST AVAILABLE COPY

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ARGUMENT

The Respondent has falsely alleged that the Ohio Supreme Court rendered its decision in this case based upon independent and adequate State grounds.

To foist this conclusion upon this Court, the Respondent asks this Court to take a piecemeal approach to the Ohio Supreme Court's opinion. The Respondent asks this Court to consider the syllabus as expressing the complete reasoning of the Ohio Supreme Court and as a complete expression upon the grounds upon which its opinion was based. This is patently meritless.

Secondly, the Respondent asks this Court to consider the "structure" and layout of the opinion as it is written, rather than focusing on the reasoning expressed therein.

The Respondent maintains that the

Ohio Supreme Court did not rely on, nor interpret Booth v. Maryland (1987), 107 Sup. Ct. 2529 and South Carolina v. Gathers (1989), 109 Sup. Ct. 2207 when it rendered its decision, stating that the victim impact testimony adduced at trial was constitutionally impermissible. The Respondent claims this conclusion was reached on independent and adequate State grounds. A reading of the opinion totally belies this contention.

If this Court examines the section of the Ohio Supreme Court's opinion, which the Respondent claims was decided upon an independent and adequate State ground, i.e.

I E
Testimony Recommending a Death Sentence.

(State v. Huertas (1990), 51 Ohio St. 3d 22 at 26-27; Petition for a Writ of Cert., Appendix pages 20-23), this Court

will find the Ohio Supreme Court expressly claimed to have followed Booth v. Maryland, supra, and South Carolina v. Gathers, supra, and based its decision thereupon.

"After reviewing the arguments presented, we find no grounds on which to distinguish Booth and Gathers, and we are thus compelled to follow those cases, vacate the sentence of death, and remand for imposition of a life sentence in accord with Penix, supra." [Emphasis added]. State v. Huertas (1990), 53 Ohio St. 3d at 27; Petition for a Writ of Cert., Appendix page 23.

If this express reliance on Booth v. Maryland, and South Carolina v. Gathers without any reference to state evidence law or any other state law is not enough to convince this Court, a reading of the concurring and dissenting opinions will

irrefutably demonstrate that the majority relied solely upon Booth and Gathers when it rendered its decision in this case.

In his concurring opinion, Chief Justice Moyer emphasized Justice Resnick's urging of the United States Supreme Court to reconsider Booth and Gathers. Chief Justice Moyer spoke of the confusion generated by these opinions. He stated, "Under the holdings of both Booth and Gathers referred to in the majority opinion, we simply have no discretion, when presented with the facts in this case, to decide that the use of the victim impact statement herein did not violate those holdings." State v. Huertas, supra at 33; Petition for a Writ of Cert., Appendix pages 45-47 at 46-7.

In his dissenting opinion, Justice Douglas points out that the majority has wrongfully interpreted Booth and Gathers.

State v. Huertas, supra, at 33-35; Petition for a Writ of Cert., Appendix pages 47-54.

Justice Douglas stated, "Because I do not believe that the United States Supreme Court intended such a result, I urge that Honorable Court, should this matter be appealed, to review this case which so plainly misconstrues both Booth and Gathers." State v. Huertas, supra, at 34-5; Petition for a Writ of Cert., Appendix at 54.

Justice Resnick simply urged this Court to reverse Booth and Gathers as a "step backwards."

All three of the justices who wrote separately concerned themselves only with one issue which involves Booth and Gathers. If the majority decision were premised upon an independent and adequate State ground, they would not have

expressly stated they "followed" Booth and Gathers to arrive at their decision. Likewise, the dissenting and concurring opinions would not focus upon the issues set forth solely in Booth and Gathers.

If this case turned upon adequate and separate State grounds, it was certainly beyond the express language of the majority opinion. If their opinion rested on an adequate and independent State ground, three of the Justices of the Ohio Supreme Court would not be urging the United States Supreme Court to either review the majority's holding and/or reverse or clarify Booth and Gathers.

The Public Defender fails to point out that the evidence adduced concerning the ultimate issue in this case, i.e. the death penalty, was first elicited by the defense on cross-examination of the

victim's mother.

To the contrary of the Respondent's assertion, the second expression by the victim's family concerning the ultimate issue in the case which was elicited by the State, makes this case a particularly apt vehicle for this Court to reconsider or define its position on these issues. This Court has not defined the constitutional parameters which limit how far the State may go in support of its "legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in***." Booth v. Maryland, supra, at 2540.

The existence of this testimony concerning the ultimate issue was set forth in the Petition for a Writ of Certiorari on pages 6-7.

This Court did not improvidently allow this case. As argued in the Petition for a Writ of Certiorari, this case presents the opportunity for this Court to correct the Ohio Supreme Court's misinterpretation of Booth and Gathers because the offender intimately knew the victim and his family. This case presents the United States Supreme Court the unique chance to define the balance struck between the rights of the defendant and the inclusion of the victims in our system of justice, without overruling Booth or Gathers. This case also presents this Court with the opportunity to overrule these cases, if it should so desire.

The State of Ohio, requests this Court to overrule the Respondent's Motion to Dismiss.

Respectfully submitted,

GREGORY A. WHITE
Prosecuting Attorney
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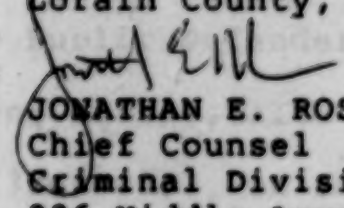
By: 

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CERTIFICATE OF SERVICE

I, Jonathan E. Rosenbaum hereby certify, pursuant to U.S. Sup. Ct. R. 28.3 that three copies of the foregoing Brief on the Merits were sent to Joan Bour-Stokes, Ohio Public Defender's Office, 8 East Long Street, 11th Floor, Columbus, Ohio, 43266-0587, on this 24 day of October 1990 by depositing the three copies in a United States mail box with first class postage affixed thereto.

JONATHAN E. ROSENBAUM
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JOINT

APPENDIX

Supreme Court, U.S.
FILED
NOV 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. - 89-1944

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF OHIO

Petitioner,

vs.

EDIBERTO HUERTAS

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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DIRECT EXAMINATION OF ELIZABETH HARRIS BY MR. ROSENBAUM:

Q Ma'am, would you state your name and spell your last name for the record, please.

A Elizabeth Harris, H-A-R-R-I-S.

Q Are you married, ma'am?

A Yes, I am.

Q For how long have you been married?

A 33 years.

Q What's the name of your husband?

A Ralph M. Harris, Sr.

Q Did you have children as a result of your marriage, ma'am?

A Yes, I do.

Q How many children did you have?

A I have 4 adopted; and I have 3 of my own.

Q Did you have a son by the name of Ralph Harris, Jr.?

A That's my oldest son that I had myself.

Q Is he alive today, ma'am?

A No, he's not.

Q Do you know the man seated immediately to my right, the Defendant in this case, Ediberto Huertas?

A Yes.

Q How did you come to know him?

A Through my son, because they were dear friends.

Q Do you know a woman by the name of Elba Ortiz?

A Yes.

Q How did you come to know her, ma'am?

A It was through my son.

Q What did your son do for a living immediately prior to his death?

A He was a welder before going in the

Service; and from that he went into the Service; and he was in the Air Force before he died.

Q Did he have a rank, ma'am?

A Yes.

Q What was his rank?

A Sergeant.

Q Where was he stationed?

A He was in Korea.

Q Did he come home on leave from the Air Force?

A Yes, he came --

Q Do you recall the date his leave began?

A His leave -- he came home, I think it was about the 15th of May.

Q Of what year?

A Of 1986.

Q It was just this past May, then?

A Yes.

Q How long was his leave to be for?

A He was here mainly because of his son's birthday; and he was to be here until the 27th of June; and he was to leave the airport on the 28th to meet back in California, going on his way to the Philippines.

Q So he had a month's leave about, correct, or slightly longer, even?

A No. Maybe he did. Right now, I wouldn't -- I know from May 15th to the 27th of June.

Q Now, do you know if your son, Ralph Harris, Jr., was dating anyone when he was home on leave this past May?

A Yes, he was.

Q Who was that person?

A Elba.

Q Elba Ortiz?

A Elba Ortiz.

Q Are you aware of any relationship Elba may have had with the Defendant in

this case?

A No, I do not.

Q Did the Defendant ever come to your home prior to your son's death and discuss Elba with your son?

A Yes, he did.

Q Do you recall the date that that happened?

A That was on May the 31st.

Q Do you recall what day of the week that was?

A That was on a Saturday morning one week before he died.

Q Were you able to overhear this conversation?

A Yes, I did.

Q How many times --

A Because --

Q How many times did the Defendant come to your house that day?

A He came to my house twice. He first

came that morning; and he wasn't so well-dressed.

Come to find out he said he could -- after he came to the door, I was the one that went to the door; and as usual, I -- there is about 6 of those boys. Usually when they come, I invite them in; but he did not come in that morning. He said, no, he would stand out there, he wanted to talk to my son; and I told him okay.

Before he came home, we had heard --

MR. BRADLEY: Objection

A -- that he said he was going to kill him.

MR. BRADLEY: Objection, ask that --

THE COURT: Sustained at that point. It would be what she heard.

Q Just try to answer my questions. Okay, ma'am. I know it's hard for you --

A Okay.

Q You said you answered the door; and the Defendant did not want to come in the house?

A No, he wanted to talk with my son.

Q Did you go and get your son?

A Yes.

Q And did you overhear the conversation between your son and the Defendant?

A Yes, I did.

Q Will you tell the Court and Jury what you overheard the Defendant say?

A Eddie told my son he wanted to talk with him; and my son said okay. Eddie had brought his car up to the front porch; and he walked back to the front of his car, and the 2 of them -- well, knowing what I knew, I went and sit by the window right by his car where he had drove up near the front porch; and the window was right by it because I got a narrow drive.

You can hardly go in it without going on my steps; and Eddie told him he wanted to talk.

And so Ralph told him okay, he would talk with him. So, Ralph and him stood there by the car; and he told him he wanted to know was he seeing his woman; and my son told him, no, he did not -- was not seeing his woman.

At first he told him it wasn't any of his business; but he asked him again. So he told him he didn't think it was his business; and he asked him again; and he told him, "Well, I don't go with your woman." He said, "Your woman is Arlene. Elba is single; and I'm single." And he said, "I am not going with your woman."

So he asked him if he would quit seeing him -- seeing her; and he wouldn't give him no answer. So he said he thought that his silence meant that he wouldn't;

and he said he could not work that morning. That was the reason why he came, because he walked off the job.

He could not work -- work; and he came over to talk. So, therefore, but talking with him he didn't get the answer that he wanted, so he told him -- oh, Jesus.

Q Tell these people, Mrs. Harris, what you heard the Defendant say to your son that day?

A He told him that he didn't want to end their friendship this way.

Q Did he say anything else?

A Yes.

Q What was that, ma'am?

A He said -- well, he said, he just come to tell him -- he said that he was going to waste him.

Q Did he say why?

A Because he wanted him to stop seeing

Elba.

Q What happened after the Defendant said that to your son, ma'am, on that Saturday morning?

A My son said, "Well, you know where I live." And he walked away. He shucked up his shoulders. He said, "Well,you know where I live."

And he walked on back in the house.

Q Did you later see the Defendant on that same day, Mrs. Harris?

A Oh, dear God. Oh, Jesus.

THE COURT: Mrs. Harris, do you want a glass of water or anything?

A Please.

THE COURT: Jeff.

A Lord have mercy.

Q Mrs. Harris, do you think you could tell me and the Court and this Jury if you saw the Defendant again on that same day?

A Yes, I did.

Q About what time was that, ma'am?

A Oh, I guess it was about an hour later. Eddie came back to the house. I went to the house -- went to the door again myself.

This time my son was just finishing in the bathroom. He had taken a bath, shower, and had changed and put his -- the clothes he was going to put on for the day and fixed his hair; and he was at the mirror.

And I said, "Ralph, Jr.," I said, "Honey, Eddie is out there again."

And I said, "He said he wants to see you, wants to see you a minute."

At this time, my husband was outside; and he was watching -- trying to watch, you know, because he didn't know what Eddie was going to do; and so he said he had been over where Elba was. And

he told Elba; and Elba told him to come back, tell Ralph, Jr. he did not want to see him -- she did not want to see him again.

So, my husband -- my son says, "Well, Eddie," he says, "if Elba says that, Elba is going to have to tell me herself." And so he wanted to know was he still going to see him.

He said, "It's none of your business."

A And so he says, "Well, I see you don't want us to be friends."

And he said, "I still say I'm going to have to waste you." He said, "You know, you know I don't do -- I don't do it fair," he said, "but I'm going to waste you."

And he left. And I didn't see him all that week; but Danny was there every day.

Q Danny being who?

A Danny Lopez. He was there every day.

Q He was at your home?

A In my home; and different other ones came by, but Eddie never did come back any more; and my son, he had been to the park and all.

Every time he come back, it worried me because I asked him -- did he see him or did they make up.

MR. BRADLEY: Objection.

THE COURT: Overruled.

Q Ma'am, when the Defendant came to your house on that Saturday; and he stated to your son that he left work, did he appear to be drunk to you in any way?

A I don't know because he looked worser than I ever seen Eddie.

I never seen him look that way before.

Q Now --

A So, I don't know. I really don't.

Q Was your son married in May of 1986, when he was home on leave?

A No.

Q Was he ever married?

A Yes, he was.

Q And did he get a divorce?

A Yes.

Q When was that, ma'am?

A He got a divorce, I think it was in '82 or '83. I don't know right now.

Q Did Ralph Harris, Jr. have children?

A Yes, he has one little boy.

Q How old is that boy?

A He became 5.

Q That --

A Of '86, June the 27th.

Q Is that the boy that you spoke about, that your son came home for his birthday?

A That's the boy that he came home to

have his birthday; but he never made it.

Q Do you know if Elba Ortiz is married?

A Beg your pardon?

Q Do you know if Elba is married?

A No.

Q You don't know. You don't know or, no, she is not?

A I don't know if she's married.

Q Okay. On that Saturday, did Elba come to your house also?

A Yes.

Q And did you have an occasion to speak with her?

Yes. She came after work.

She didn't come up before time for her to get off from work; and that was about 3:00 or 3:30, I think it was.

Q Do you know what she wanted at your house?

A She wanted to talk with my son.

Q And did she speak with Ralph Harris, Jr.?

A Yes, she did.

Q And did they continue their relationship after that day?

A Yes, she did. She said because she hadn't sent Eddie over there.

MR. ROSENBAUM: I have no further questions, Your Honor.

MR. BRADLEY: Your Honor, I would ask for a recess so that I can exercise the Defendant's rights under Criminal Rule 16 regarding in camera inspection.

THE COURT: Of what?

MR. BRADLEY: Her statement, Your Honor.

THE COURT: Mrs. Harris, the lady from the victim witness program, you sit with her; and she will take care of you for a while.

We are going to take a very short

recess because we have some legal matters to talk about.

You, the Jury, are not supposed to listen to these legal arguments. That's why I have to send you back and forth on occasion.

So, you may now retire to the Jury Room.

(Short recess taken.)

THE COURT: Mr. Bradley.

CROSS-EXAMINATION OF ELIZABETH HARRIS BY MR. BRADLEY:

Q Mrs. Harris, I'm Jack Bradley. We know each other, don't we, Mrs. Harris?

A Yes, I do.

Q Mrs. Harris, we have really never ever discussed the specifies (sic) about this case together, have we?

A No.

Q We have talked about other things, but not about his case?

A No.

Q I had asked you some questions about the case, but you said you better not talk to me because the Prosecutor might not want you to?

A Yes, I went to see my Prosecutor.

Q Mrs. Harris, you do know Eddie Huertas?

A Yes.

Q How long have you known Eddie?

A Oh, god, ever since they were going to school together. My son brought him over this one time.

Q Since about what grade?

A Oh, I guess, junior high school or high school.

Q It was a pretty long relationship?

A Yes.

Q Would you say they were friends?

A Yes.

Q Good friends?

A Yes.

Q Isn't it a fact that at times that they would even go out together and go out as a group of friends, maybe there would be 4 or 5 boys that would go out together?

A Yes.

Q Or maybe even after Ralph was married, that he and Eddie and their wives and so forth would go out together?

you know about that?

A I don't know about the wives; but I got pictures where him and Eddie and Eddie's wife, all of them, Arlene, was together.

Q That happened during the time that Ralph was in high school and even after he got out of high school?

A Yes.

Q You indicated that Ralph was home for a military leave. It was my

understanding that he was only home for 2 weeks?

A He was home for only 2 weeks before he died.

Q Okay. So he was only home for 2 weeks?

A And then he got killed.

Q Until the tragedy happened?

A That's right.

Q So, his relationship with Elba would have started when he got home on his leave?

Wouldn't that be correct?

A No.

Q When did that relationship start? Do you know?

A I don't know exactly when, but I know while he was away they are corresponding because I have letters that's in some of his things.

Q So, they were writing to one

another?

A Yes.

Q Do you know if he had ever gone out with her prior to coming home on his leave?

A I don't know.

Q Okay. So you didn't know about them actually dating or seeing each other prior to the time that he was home on his last leave?

A I only knew about them going out while he was home on his leave; but they were corresponding together, and the understanding that I have, before they left here, they were all together.

Q Now, that was your understanding?

A That was my understanding.

Q Now, you indicated that you had no knowledge of any relationship between Eddie and Elba?

A No, I had no knowledge of Elba and

Eddie together. All I knew before this, all this ruckus come up, was that Eddie and his wife, Arlene, that's all I ever knew until this stuff came up.

Q You --

A And, of course, I knew about the 2 girls of his that Elba had.

Q So you knew prior to this that Eddie and Elba, at least, had had 2 daughters together?

A Yes, 7 and 9 years old.

Q So they must have had some type of relationship, at least, in the past that you knew about?

A I guess they did.

Q Because they had the 2 daughters?

A But really -- when Eddie was really coming to my house quite a bit, it was Arlene; and that's what stuck within my mind.

Q So you didn't really think about the

relationship that he had had with Elba?

A No, because I figured it was all over because the understanding I had way back there, Elba and Arlene was dear friends to each other; and she had the 2 children and next thing we had heard that Elba -- I mean, him and Arlene was married; and it went out then she took her best girlfriend's boyfriend and married him, which she had had 2 children for him.

Q Who is that?

A Elba had already had 2 children for him.

Q Eddie?

A We would have figured that way back there that they are going to marry.

Q Eddie and Elba?

A Yes.

Q In any event, Eddie came over that day that you described to us?

A Yes.

Q And you said that he -- which door did he come to when he came the first time?

A He came to the back door, both -- both times.

Q He came to the back door both times?

A Yes, came to the back door.

Q And where did he pull his car up to? You said he pulled it up to the porch?

A He pulled the car up to the driveway; and here is my porch. Here is his car; and here is my window.

Q What window is that you are talking about?

A My living room window.

Q Okay. And so Eddie came to the back door; and then Ralph did come out to talk with him?

A Yes.

Q And then they did have a discussion

about Elba?

A Yes.

Q Now, do you recall talking with Elba about the conversation that Eddie and Ralph had about her? Do you ever recall talking about that with Elba?

A What -- that day?

Q About what Eddie said that day to Ralph?

A Do I recall Elba talking about it?

Q With Elba?

A No, I don't recall Elba talking about it.

Q See, what I'm asking is if you and Elba ever talked about what Ralph and Eddie had a conversation about that day?

A No, not -- I mean, I can't remember at this point now.

Q You can't remember?

A Of Eddie -- of Elba.

Q That you told --

A She just told -- if you talking about when she came to the house, she said that he had came to her job; and told her -- I mean, talked with her.

Q I'm talking about after this whole thing happened. Okay. After what happened to Ralph happened, after that, do you remember ever having a conversation with Elba about what Eddie said?

A No, because one thing Elba, after all of this happened, the understanding that I had -- my daughter was --

Q Mrs. Harris, did you have a conversation with her or not?

A About --

Q About what Eddie said to Ralph?

A No, I don't remember.

Q So you don't remember having a conversation?

A I don't remember talking about that.

MR. BRADLEY: I have nothing further

of this witness, Your Honor.

MR. ROSENBAUM: I have no other questions, Your Honor.

THE COURT: Thank you, Mrs. Harris. You are excused at this time.

[Trial Tr. at 659-661

ln 21]

DIRECT EXAMINATION OF ELBA ORTIZ BY MR. ROSENBAUM:

Q. State your name, please, ma'am, and spell your first and last name for the record, please.

A Elba Ortiz, E-l-b-a, O-r-t-i-z.

Q Are you employed anywhere at this time, ma'am?

A Yes, I am.

Q Where at?

A The Lorain County Bank.

Q How long have you worked there?

A Since January 9th.

Q Where do you live?

A 1919 G Street.

Q Do you think you could speak a little louder and maybe a little more slowly, please.

Do you know the Defendant in this

case, Ediberto Huertas?

A Yes, I do.

Q When did you first meet him, ma'am?

A The year of '77.

THE COURT: Can you get just a little closer to that microphone. Okay.

Q How did you come to meet him?

A In school.

Q Do you love Ediberto Huertas today?

A Yes, I do.

Q Are you the mother of 2 of his children?

A Yes.

Q Is Eddie married to another?

A Yes, he is.

Q What is her name?

A Arlene.

Q You know Arlene as well?

A Yes.

Q Did you go to school with her?

A No.

Q Did you know a man by the name of Ralph Harris, Jr.?

A Yes, I did.

Q How did you know him?

A When I used to go to elementary school.

Q You have known him for a very long time, right?

A Yes.

Q What was your relationship with Ralph Harris, Jr.?

A We were friends.

Q Were you more than just friends?

A Yes.

Q Did you date?

A Yes.

Q Were you his lover?

A Yes.

Q And was he at your home on June 7th of 1986, when he was stabbed?

A Yes, he was.

Q Did you love Ralph Harris, Jr., ma'am?

A No.

Q Well, would you describe for me and the Court and the Jury your relationship with him?

A We were starting to get to know each other as lovers.

Q Were you hoping that a relationship would develop with him?

A Yes, I was.

Q On a more permanent basis?

A Yes.

[Trial Tr. at 674-675
ln 4]

CROSS-EXAMINATION OF ELBA ORTIZ BY MR. BRADLEY:

Q Now, Elba, Ralph was home approximately how long prior to the incident that happened where Ralph was killed?

A A week and 5 days.

Q Okay. Prior to that time, had you had any love for or relationship going on with Ralph Harris?

A How long?

Q No. Prior to that time, had you had any kind of relationship or love relationship going on with Ralph Harris?

A No.

Q Now, there was some testimony that you had been writing letters, you and Ralph?

A Yes.

Q What was that writing letters all about?

A They were more like somebody to write to, and for him to have somebody to write to.

He used to write to both me and Eddie.

Q He would write to Eddie, also?

A Yes.

Q These were letters that you would send to a friend?

A Yes.

Q A friend that was in the Service?

A Yes.

Q He would also write to Eddie as a friend?

A Yes.

Q I would take it that Eddie might write to him also?

A Well, I would write to him instead of Eddie.

[Trial Tr. at 747-750
ln 7]

DIRECT EXAMINATION OF DANIEL LOPEZ BY MR. BRADLEY:

Q Would you please state your name and address for the Court and for the Jury.

A My name is Daniel Lopez. I live at 2399 Caroline Avenue, Lorain, Ohio 44052.

Q Daniel, are you employed?

A Yes, I am.

Q Where are you employed?

A I'm employed with Manpower through Plastic Enterprises in Elyria.

Q What hours do you work?

A I work the night shift, 10:00 at night till 8:00 in the morning.

Q Did you work last night, Mr. Lopez?

A Yes, I did.

Q Did you come right from work to Court?

A Yes, sir, I did.

Q Is that the reason that you are dressed the way you are?

A Yes, sir.

Q You were under a subpoena to appear in Court?

A Yes, sir.

Q Are you acquainted with Eddie Huertas?

A Yes, sir.

Q This is Eddie Huertas that you know?

A Yes, sir.

Q How long have you known Eddie?

A I have known Eddie since like about 10 years.

Q How did you come to meet Eddie?

A Through high school.

Q How would you describe the relationship that you had with Eddie?

A Good relationship. We were best friends.

Q Okay. Are you still a good friend of

Eddie's?

A Yes, sir.

Q Did ycu know Ralph Harris?

A Yes, sir.

Q And how long have you known Ralph Harris?

A I know Ralph Harris since we was like in 5th grade.

Q You knew Ralph before you even knew Eddie?

A Yes, sir.

Q How would you describe the relationship that you had with Ralph?

A Me and Ralph had a beautiful relationship, best of friends.

Q You were good friends with him also?

A Yes, sir.

Q Did you know Elba Ortiz?

A Yes, sir.

Q How did you come to know Elba?

A Like I know -- well, I had known

Elba for a while; but I have never talked to her or nothing like that.

But when I came out of the Service, and when Eddie was living over there; and I had start going over there to visit over there like, maybe, 2 years.

Q Over there? Where is that?

A On G Street.

Q When was this when you came out of the Service?

A In '83.

Q Eddie was living there at that time?

A No, he wasn't living over there at that time.

He was living at -- he had an apartment down the street.

I think it was, maybe, 24th Street or something like that. It was upstairs of a house.

Q But you would have occasion to visit at Elba's residence after you got out of

the Service?

A Yes, sir.

Q How would you describe Eddie's relationship with Ralph Harris?

A We were all best of friends. We went to Cedar Point. We did everything. We all hang together, making time together.

[Trial Tr. at 804

ln 1-20]

DIRECT EXAMINATION OF EDIBERTO HUERTAS BY MR. BRADLEY:

Q Did you know that Elba and Ralph had been writing letters to one another?

A At the beginning when he left, to me they were writing, corresponding as friends. He was writing what happened out there; and he would write to me and her.

Q He would write to you, also?

A Yes, but it was like in the same letter.

Q So you knew about that?

A Yes.

Q Did you have any problem when you saw Ralph over there that day?

A No.

Q Anything unusual happen that day?

A No, I was -- only thing I wondered because he had been here 2 or 3 days

prior to; and he hasn't -- because I gave -- Elba knew my address; and since he always comes to visit me, you know, come over to my house where I'm staying now. But he hasn't. But when I went over to work, I just took it -- we just started talking about his trip up in Korea, what he was doing there, how it was.

[Trial Tr. at 807
ln 22-
811
ln 14]

Q Now, was this before or after you went over to Ralph's residence to talk to him about the situation between the 3 of you?

A I can't really remember.

Q Okay. In any event, do you recall that you went over to talk to Ralph about the situation?

A Yes.

Q Do you recall what day of the week it may have been?

A Could have been a Saturday.

Q So that would have been, maybe, the first Saturday that Ralph was home or you are not sure?

A I'm not sure.

Q Tell us what you recall about that

particular meeting with Ralph Harris?

A Well, I went over to his house; and I knocked on the door; and I asked for Ralph.

Q All right.

A And they got him; and he came outside.

Q Now, when you knocked on the door, do you recall who answered the door?

A It was somebody. It could have been his sister -- her sister -- could have been his sister. Excuse me.

Q Was it his mother?

A No, not the first time.

Q Which door did you knock on? The front door or the back door?

A Back door.

Q Then what happened?

A Well, he came outside, and I didn't know. I told him -- how I first came out with it, I told him I didn't know how to

go about this because this was the first time I had to talk to a friend about a situation like this.

And he says, "What you got to say?"

And I said, "Well, I know that you have been seeing Elba."

And he goes, "Yes."

And I says, "You know about me and her, how we are."

And he goes, "Yes," And he goes, you know, says, "You know you are married."

I says, "Yes, but you know how I have been all my -- all these times that you have seen me that you even find it strange. You come one time on leave, you see me in my wife's house; the next time you on leave, I'm over at Elba's house."

Q That was your life-style, Eddie?

A Yes.

And I told him about our friendship and her -- and her relationship with me.

At that point that I know how Elba and me are, that we can have our ups and downs; but we always come back, but our friendship between him and me, we are male friends; and he goes to the Service; and we just going to get mad at each other over a female.

Q Did you have any argument with Ralph at that time on this particular morning?

A No, because my basis to start out the conversation -- I said, "I'm not here to argue. We are just friends because this is hard for me because I don't want to lose my friendship over Elba" -- my friendship with Ralph over Elba.

Q Did you threaten him in any way?

A No, sir.

Q Did you say anything about wasting him?

A No, sir.

Q What did you do after you left?

A I left; and I went over to -- because in that conversation he kept on saying that he wants to hear from Elba, not from me; so I went to her job and talked to her.

Q Did you have a fight with Elba when you went to talk to her?

A No, we just talked. It was her place of employment where she was at.

Q After that conversation, then, what did you do?

A I went back to Ralph's house.

Q What happened during that conversation?

A Basically the same thing, but I told him that Elba said, you know, that she, you know, she wants to be with me.

Q Was that the truth?

A Not at that moment, no.

Q So, you told Ralph a lie because you didn't want him to be with Elba?

A Right.

Q What did Ralph say to that?

A He still kept on insisting that he wants to hear it from her voice.

Q Did you threaten him at that point?

A No, sir.

Q Was anyone else in Ralph's family around besides his mother during either one of those conversations?

A His father was outside mowing the lawn.

Q He was?

A Yes.

[Trial Tr. at 834

ln 7-11]

CROSS-EXAMINATION OF EDIBERTO HUERTAS BY MR. ROSENBAUM:

Q Mr. Huertas, but you specifically remember what you said that day to Ralph, Jr. while Mrs. Harris was listening; and she is lying, right?

A Not all of it. I don't remember everything that I said that day.

[Penalty Phase Tr. at 67-71 ln 11]

DIRECT EXAMINATION OF ARLENE HUERTAS BY MR. BRADLEY:

Q Arlene, when were you and Eddie married?

A In '82.

Q In 1982?

A Yes.

Q Do you know the month and day?

A November 11.

Q November 11th of 1982?

A Yes.

Q Arlene, would you please explain to the Jury the circumstances under which you and Eddie got married?

A What do you mean?

Q Well, did you go to a church and get married or did you go to the priest and get married or did you go to the Mayor and get married?

A No, we got married at Welfare.

Q Would you explain to the Jury how you got married through Welfare?

A We went one day; and they just stamped this paper and legally got us married.

Q Do you know what that marriage is called, the type of marriage that's called?

A Common Law.

Q So, you and Eddie were a Common Law marriage?

A Yes.

Q You were not church married?

A Church married?

Q Church married.

A No.

Q Do you go to church?

A Once in a while.

Q Where would you go to church at?

A Sacred Heart Catholic Church.

Q You never did follow through with any type of marriage of this nature?

A No.

Q How long had you known Eddie prior to marrying him?

A Since I was 16.

Q Okay. How did you meet Eddie?

A Through a friend.

Q How old were you when you married Eddie?

A 19.

Q So, you knew Eddie approximately 3 years before you married him?

A Yes.

Q Have you had any children with Eddie?

A I have 3.

Q What are their names and ages?

A I have Raquel. She is 5. I have a Nicole. She is 4; and I have an Eddie that's going on 2.

Q Now, were any of these children that you had with Eddie born prior to the time that you and Eddie formalized or had this Common Law marriage established?

A Before.

Q Yes.

A Yes, Raquel.

Q How many years prior to you and Eddie formalizing your marriage was Raquel born?

A She wasn't even a year, I don't think.

Q So, during that period, during her first year, you and Eddie formalized your relationship?

A Yes.

Q Now, did you know if Eddie was having or had had a relationship with any other female besides yourself from the time that you had met Eddie when you were 16?

A Before?

Q Right.

A He was having something with Elba.

Q Is that Elba Ortiz?

A Yes.

Q And did you know how long that had been going on?

A I think she was 15 at the time.

Q What's the age difference between you and Elba, if you know?

A About 2.

Q 2 years?

A She's, I think, 25. I'm going on 27.

Q Do you know if Eddie had nay children with Elba?

A Yes, 2 girls.

Q Are they older or younger?

A Older.

Q How old are they?

A I think they are 9 and 8.

Q Was there ever any conflict between

you and Elba regarding the relationship with Eddie?

A Yes.

Q What was that conflict?

A Well, I was married to him; and she kept interfering in our life; and I'd get tired of it; and I just let go.

Q When did that conflict start between you and Elba?

A Little bit after I had my daughter.

Q That would be your first child?

A Yes.

Q And it continued for how long?

A Till this day.

Q It's still continuing to this day?

A Yes.

Q What do you mean by that?

A Well, like things come out in the paper, she will like rub it in my face; and I just have to take it because I don't feel like going through the

trouble.

Q Did you know Ralph Harris?

A Yes, very well.

Q How did you come to know Ralph Harris?

A I met him through Eddie and his other friends. They were all very close.

Q And tell us about the relationship that you and Eddie had with Ralph Harris?

A Well, he would come out from leave; and we would spend time. We would have cookouts. We would go bowling together. We would have a real nice time with his son and our kids. We got along great.

[Penalty Phase Tr. at 75 ln 1-17]

Q Now, even though it appears that you and Eddie had separated, what was Eddie's relationship with his children?

A Oh, he was always great with his kids.

Q Can you explain that to the Jury?

A He always made sure they had what they needed. He always showed them he loved them. It was always clear to them.

My daughter goes to see him now; and she wants to hold him so bad; and it hurts her.

Q Can she do that?

A Pardon?

Q Can she do that?

A Can she hold him?

Q Yes.

A No, she can't because she has -- got

that glass behind each other.

ARLENE HUERTAS

[Penalty Phase Tr. at 78 ln 2-20]

Q Did you have an opportunity to observe the relationship that Eddie and Ralph Harris had together?

A Yes, they had a very good relationship. Every time he would come home from leave, the first one he would go see was Eddie; and they would go out dancing.

Ralph didn't drink. He would have his root beer; and they would have a nice time.

Q Did you ever observe any problems between the 2 of them?

A No.

Q You would classify that as a good friendship?

A Oh, very good friendship.

Q Were you surprised when you found

out what had happened?

A Very surprised.

Q Why was that?

A Because they got along so well; and they were going out dancing and partying together and everything else.

His other best friend tells me this happened.

[Penalty Phase Tr. at 85
ln 17-24]

CROSS-EXAMINATION OF ARLENE HUERTAS BY

MR. ROSENBAUM:

Q Do you think that Ralph Harris, III, would like to hold his father right now?

A Yes, I know he would.

Q There is more than glass between him and his father, isn't there?

A Yes.

Q There is about 6 feet of dirt, right?

A I understand that.

[Penalty Phase Tr. at 86
ln 12-19]

REDIRECT EXAMINATION OF ARLENE HUERTAS BY MR. BRADLEY:

Q Arlene, you knew Ralph Harris real well, didn't you?

A Yes.

Q Do you think Ralph Harris would want Eddie to be able to hug his daughter?

MR. ROSENBAUM: Objection. There is no way --

THE COURT: What Ralph Harris wants, sustained.

[Penalty Phase Tr. at 94-98 ln 24]

DIRECT EXAMINATION OF CARMEN FLORES BY MR. BRADLEY:

Q All set, Carmen?

A Yes.

Q Carmen, would you please state your name and address for the Members of the Jury here.

A My name is Carmen Flores; and I live at 2105 E. 31st Street.

Q That's in Lorain, Ohio?

A Yes, Lorain.

Q Carmen, do you know Eddie Huertas?

A Yes, I do.

Q How do you know Eddie?

A Eddie is my brother.

Q How old are you, Carmen?

A 30.

Q Are you married?

A Yes, I am.

Q What's your husband's name?

A Padre Jose Flores.

Q Do you have any children?

A Yes, I do.

Q How many children do you have?

A 2 girls.

Q What are their names and ages?

A Lydia Flores, 8; and Teresa Flores, 7.

Q Did you know Ralph Harris?

A Yes, I did.

Q How did you come to know Ralph Harris?

A In high school, around the house, my parents' house.

Q Ralph would be over at your parents' house?

A Yes.

Q Did you consider Ralph a friend of yours?

A Yes.

Q Was Ralph involved in any special event of yours?

A Yes, he was.

Q What was that?

A When I got married October 1st, 1977, he chauffeured my husband and I to church, reception, everywhere we had to go.

Q Why did you have Ralph?

What was your reason for asking Ralph to do that?

A Because we needed a car; and he volunteered that his dad would lend us his car.

Q Were Eddie and Ralph good friends during that period?

A Yes, they were.

Q To your knowledge, did they continue to be good friends?

A Yes.

Q Now, are you really Eddie's sister?

A (No response).

Q Are you Eddie's real sister?

A No.

Q Could you explain to the Jury why you are not his real sister?

A Because my -- my real natural parents gave me to our parents, Rafael Asencio.

Q So, your real parents are not Rafael Asencio -- and what's your mother's name?

A Miguelina.

Q Miguelina Asencio. They are not your real parents?

A No.

Q Do you know who your real parents are?

A Yes.

Q Who are your real parents?

A Clara Maldonado and Carmello Maldonado.

Q When did you come to live with Mr.

and Mrs. Asencio?

A I think I was 2.

Q Was that before Eddie was born or after Eddie was born?

A I think he was born -- I mean, he was there.

Q You think he was. How old are you now?

A 30.

Q And Eddie is?

A 27.

Q So, maybe --

A He wasn't. He wasn't Sorry.

Q Are Ralph and Miguelina Eddie's real parents?

A No.

Q Who are Eddie's real parents, if you know?

A Carmen Huertas and Joe Huertas.

Q Do you know how Eddie came to live with Asencios?

A No.

Q Now, I would take it that you and Eddie grew up as brother and sister?

A Yes, we did.

Q How old were you before you found out that Eddie was not your real brother?

A Could you explain?

Q Do you remember how old you were when you found out that Eddie was not really your brother?

A Well, I think he was 17, so I was --

Q 19 or 20?

A 19.

Q When did you find out that the Asencios were not your real parents?

A After I got married and sent for my birth certificate.

Q That's when you found out?

A Yes, that was in 1980, May.

Q Describe the relationship that you and Eddie had when you were growing up?

A It was a good relationship. We went to school, you know, praetically together, went through high school, through -- we were always together.

You know, I have my kids. He would take care of them. If I would ask him for a favor, he would help me with it.

Q Has that relationship continued after you left your parents' home?

A Yes.

Q Did it continue up until the time that Eddie was arrested for the death of Ralph Harris?

A Yes, it has continued.

Q You said that he would help you with your children?

A Yes.

[Penalty Phase Tr. at 104-5]

Q What was that?

A That they didn't tell me the truth, like they didn't tell Eddie until he found out, and I have resented that for a long time.

Q Have they ever told you the truth?

A No.

Q You found this out on your own?

A Yes.

Q Have you ever seen Eddie with his children?

A Yes.

Q Describe Eddie with his children?

A He's a wonderful father. They love him. They -- they really do.

Even my kids love him. They would rather be with him than with us.

Q Well, you know that Eddie didn't live with his children for long periods

of time, don't you?

A Yes.

Q And you know that there were periods of time when Eddie didn't support his children. Do you know that?

A I think so.

Q And how can you say that he is a good father?

A Because he would see them. He would go see them. Oh -- or I would take them to him; and they still knew.

Q Did you see any love between Eddie and his children as far as Eddie showing any love to his children?

A Yes.

Q You said that they do love him?

A Yes.

MR. BRADLEY: I have nothing further of this witness.

CROSS EXAMINATION OF CARMEN FLORES BY MR. ROSENBAUM:

Q Ma'am, were the Asencios good to you and Eddie?

A Yes, they were.

Q Took you into their home?

A Yes, they did.

Q Supported you, clothe (sic) you both?

A Yes, they did.

Q Treated you as if you were their own children, right?

A Yes.

Q So, from that standpoint, the Defendant had a normal childhood?

A Yes.

Q In fact, the only problem there may have been was the fact that Mr. Asencio wasn't faithful all the time, you are saying, to his wife; is that correct?

A Yes.

[Penalty Phase Tr. at 112 ln 4-23]

DIRECT EXAMINATION OF RALPH ASENCIO BY MR. BRADLEY:

Q Ralph, you know Eddie Huertas?

A He is my son.

Q Now, is he really your son?

A No, he is my -- he is my godson, my grandson; and I raised him.

Q Is he any blood relative of yours, Ralph?

A No.

Q How did it come about that Eddie came to live with you?

A Well, I am married to his grandmother; and his -- he has been living with us since he was 4 days' (sic) old all the time.

His mother lived with us.

Q What was his mother's name:

A Carmen, Carmen Reyes.

Q Is Carmen any relation to you?

A No.

Q How is Carmen related to your wife?

A Well, my stepson was married to Carmen. That's Miguelina's son.

RALPH ASENCIO

[Penalty Phase Tr. at 115 ln 14-126 ln 19]

Q How was your relationship with Eddie as he was growing up?

A Very well, he never have me no problems.

Q Was there ever an occasion where you and Eddie had a fight or anything like that?

A No, because he made me very proud of what he was doing in school; and so I was very proud of him.

Q Did there come a point when Eddie become (sic) involved with a girl?

A Well, he was older at that time. He was about 15 -- 16 years old; and he started going with girls and all that, which I already explained it to him; and

I told him about it.

I told him the difference.

Q Did he develop a close relationship with Elba Ortiz?

A Yes, they told me he did; and I spoke to him about it; and he told me that he was -- that that was the girl that he wanted to marry.

Q Did you later learn that Elba was pregnant?

A Much later, yes.

Q After Elba became pregnant and had her child, what happened?

A She was living in our house for a while, too.

Q How long did she live in your house?

A Well, I don't know exactly how long she lived in the house because I was running back and forth to the hospital because the baby was born premature; and she was very small and underweight and

all that.

And I paid a little more attention because he was working at that time, little more attention to Elba and the kid than anything else.

Q She did stay at your house for a period of time?

A Yes.

Q Then, she moved out of your house?

A Yes.

Q Did she ever come back to live at your house?

A Well, for a very short time after the second one was born.

Q She lived with you again?

A Yes, for a while only.

Q Did Eddie and Elba ever get married?

A No.

Q You are acquainted with Elba Ortiz and the 2 children?

A Yes, very well.

Q What kind of relationship do you have with the 2 children that Elba had with Eddie?

A I loved them very much and still do. They come over to my house every day.

Q You see them often?

A Every day.

Q Every single day?

A Every day.

Q How does that happen?

A Well, they go to school; and Elba goes to work, and my wife takes care of them. So, the bus brings them right near my house, except from there they just have to cross the street; and they are in the house.

Q How long has that been going on?

A For a while now, going on almost a year and months.

Q So, even though Eddie and Elba were not married, you maintained a close

relationship with the children?

A Oh yes, very well.

Q Ralph, there was some testimony that when Eddie and your daughter were growing up, that you and your wife would have arguments about your liking of other women?

A Well, that's my only hobby. I don't drink. I don't smoke. I have no other hobby; but as far as it's concerned, I never gave my wife any concern for that to be running around with other women and all that because I don't.

Q You acknowledge that that is a bad habit that you have:

A Of liking women? I do. I'm not going to deny that.

Q And that was a matter that you and your wife argued about quite a bit and still argue about, right?

A Well, no, because we have arguments.

We do, like every marriage; but as far as running with other women, no, because my wife is a sick woman; and now I spend more time with her than anything else.

To me, I figure she needs me more now than she did before.

Q But when Eddie was growing up and your daughter was growing up, you ran around with women much more often?

A No.

Q No?

A No.

Q You and your wife didn't argue about that?

A No, because I was paying more attention to them, their growing, than anything else.

Q Did you have girlfriends during that period?

A No.

Q None at all?

A No.

Q Now, your daughter testified that you and your wife would argue. That started when she was about 13; and Eddie was about 10, about your like for other women?

A Well, they always know that I like other women, which is the truth; but, you know, as far as going away from my home to live with other woman or sleeping with other women, no, we did, but nothing serious.

Q Ralph, did you have an opportunity to observe Eddie with his children?

A Yes.

Q Can you tell us about his relationship with his children, both with Elba and Arlene?

A Well, he bring them to the house; and he knows that I like the kids. He knows that I like any kids. I don't care

which kids it is, whether they are mine or not; and he knows about that. And he brings then over to the house; and I didn't see no difference because him and me and the kids, we used to play together. You know, I spend more time with them because I usually like them very much.

Q Did he have a good relationship with his children?

A Yes, I think he did.

Q You know that Eddie was going back and forth for a period of time between Arlene and Elba?

A Yes, we talked about that. Couple times I told him about that, that he had to make up his own mind.

Q During the last year and a half before Eddie and Ralph had the confrontation, okay, before Eddie went over to Elba's apartment, during that

period, was Eddie living with Arlene?

Do you know?

A No, Eddie spoke to me one day about it; and I told him what he was going to do. He told me he was going to move in with Elba and stay with Elba.

That was the conversation we had at home. Well, he didn't have it with me. He had it with his mother. His mother was the one that told him about it; and I said, what do you think.

And my wife said, if that's what he wanted, he was already a man; and he should decide what he wanted to do.

Then he came back to the house and told us that he was living over at Elba's house, even though he had an apartment already.

Q So, during that last year and a half period, as far as you know, he was not living with Arlene?

A No.

Q Did you know if Arlene was living with someone else during that period?

A Yes.

Q Who was that?

A Well, I don't know the boy, exactly, you know; and they only told me. But I don't believe in hearsay. When I find out for myself; and I found out that she was living with somebody else, yes.

Q Do you see Arlene's children, also?

A Yes.

Q Did Eddie continue to see his children even after he and Arlene broke up a year and a half ago?

A Yes, he brought them to the house a couple of times.

Q And he was seeing them?

A Yes.

Q Mr. Asencio, do you know Ralph Harris or did you know Ralph Harris?

A Very well. He has been over at my house since he was a little boy. He was like one of my family, because him and Eddie was always good friends; and he was coming in and out of my house.

Q Did you see Ralph Harris the last time he was home on leave?

A The second day he came from leave, he come to see me and -- because he always had a habit of always coming over.

First he goes to his mother's house. Then he comes over to the house. He came to the house; and he put his arms around me and said, "How are you doing, pop?"

The same thing he did to my wife.

Q Did he call you pop?

A Yes, and he called my wife mom. That's the way it's always been. Mostly all of them did because there was about 8 or 9 of them, the boys and girls that used to come over to the house, my

daughter's friends and my son's friends; and that's what they used to call us.

And we asked him about the baby, said, "Where is your son? Didn't you bring him along?"

I think the day after that he said, "I'll bring him over tomorrow."

He did; and the kid ran over to me. Well, he says, "How you doing, pop?" And he ran in the house and talked to my wife and told my wife, "Where are my cookies, mom?"

My wife said, "You know where they are. Go get them."

And that was it.

Q So, Ralph came over twice to see you during that last time that he was home?

A Yes.

Q Did he talk to you about his plans?

A Well, he told me he wanted -- he asked me if it was okay if he comes over

one day and he talks to me because he wanted to find out how did I feel about him getting the place where he was going to. I didn't know exactly where he was going to be transferred to; and he wanted to talk to me because he usually had that habit of coming over.

I was one of them who pushed him into going into the Service because he asked me what I felt about him going to Service, because 2 of the other boys was going in; and he found out --

Q Did Eddie ever try to get into the Service?

A Yes.

Q Was Eddie successful in getting in the Service?

A No. He had bad eyesight, I heard, because I went down to get ahold of his papers and everything. That was one of the reasons they all wanted to join in

the Service, because they all decided to join in one time and join the Service; and they come over and talk to me about it; and Ralph came over and talked to me about it, and every time he used to come on leave, he used to talk to me.

Q Did Ralph talk to you about his relationship with Eddie and Elba when he came over?

A Well, I knew he was getting along with Eddie because he always used to come over and asked me where Eddie was; and I used to tell him he is at work, or he is over at his house, because sometimes Eddie used to come over and stay in his room because we still got a room in the house that belongs to him, one to my daughter and one to him; and him and Ralph -- and whenever the boys come -- used to go upstairs and play the phonograph and talk and all that.

And that day he did. He came over and talked to me. He asked me if I seen Eddie.

But I found it strange because he came in with Elba. He didn't come by himself.

Q He came over to your house with Elba?

A Yes.

Q Do you know Ralph Harris' parents?

A Yes.

Q How well do you know them?

A Not as well as I know the boy because I only met them once, twice in that time. Once I met them in the market and then another time near the house.

Q Were you surprised about what happened that night with Eddie and Ralph?

A Well, I was shocked that night; and I was nervous that night also because, at the same time, my wife was having -- the

night that this happened, my wife was having kidney surgery; and I was -- we were asking about what happened with him.

They come over to the hospital with us, with my daughter and I; and we were waiting for him. And then in the morning, when I went home to feed my dog, they called and told me about it.

I was still in the hospital because my wife was still in the coma; and it hurt me; and I almost felt bad -- fell down, I should have said, because my wife -- I was hurting because of my wife; and at the same time, one of my kids was hurt because -- I say one of my kids, because they were one of my kids. We had them when they was kids -- said they come -- one of the kids, whoever it was, whether it was Ralph or one of the other boys.

That's the way me and my wife used to call them.

Q When you are saying one of your kids, you are talking about Ralph Harris?

A Ralph Harris; and my daughter called me and told me about it. And I said, "I don't believe it."

And I told her to find out what happened because I was on my way to the hospital. I had to run back to the hospital because I wanted her, when my wife wake up, to see me, that I was still there with her.

Q You still love your son?

A Very much.

Q What was your relationship with your son after he left you home?

A The same as it was. If he needed me; I was there, because he come to the house many times. We talked; and, in fact, when he went to work, I explained to him a lot of things about insurance and about the family and all that.

Because he asked me when he wanted to talk about it; and we did, because I asked him how he felt about his job.

He said, "Dad, I like it," because he just graduated from welding school; and he had the diploma. He made me proud in one way. He had the diploma; and he passed it in honors; and he was very good. And we was making plans. I told him if he could buy the truck, I would supply the tanks and the welding equipment and all that, so that if he wanted to go in business, he could go in business for himself and this way he doesn't have to be like his father, meaning me.

Then, you don't have to be -- you can be your own boss; and you can work as you want.

UNSWORN STATEMENT OF

EDIBERTO HUERTAS

[Penalty Phase Tr. at 237 ln 20- 239 ln 17]

THE DEFENDANT: I would like to address this to Ralph Harris. Ralph Harris was a good friend of mine; and he was -- he was a friend out of the whole group that I was proud of because he is the one that made it out of Lorain.

And I would like to tell Ralph that I never imagined that this would ever happen; and I'm sorry with all my heart. And I ask for his family, Mr. and Mrs. Ralph Harris, plus his brothers and sisters and his son to find in their hearts to forgive me.

And I also ask forgiveness to my family for the hurt I'm putting them

under. I just want to say I'm sorry to the whole families, for the whole situation. I -- I cared for Ralph a lot; and I never imagined none of this would ever happen between me and him.

I ask forgiveness from the Lord; and the Lord knows my life. This happened when I was in the ways of the world. I pray for him at night. I pray for Elba. I pray for me, for God to forgive us because we were doing the things of the world. That's what led us into all this.

And I know what hurts me more now is to not know whether he accepted the Lord in his life; and I know, with the prayers of his family and his friends and my family and mine, that the Lord will take upon Him to forgive him from his sins.

See, He forgave -- as He forgave me from mine. And I did try to talk to and write to Harris' family before this; but

it was noted to me by my family and lawyer it might not be at the right time to write to them. But it's been on my mind. It's been on my mind to tell them how I feel because I know I did wrong.

Ralph, I'm sorry. And I'm sorry, too --

THE COURT: Do you want a glass of water or anything, Kleenex or anything?

THE DEFENDANT: There is so much in my head to say; but about the change I have gone through through all this -- like I said, before I was doing the things of the world; and there is no way possible that I would ever thought I would do this to Ralph.

I also wanted to go to the Service; but I couldn't go; and he made it out of all of us. And he was going to make it a career; and I was proud.

And I would just like to say again

to Mrs. Harris that I'm sorry, and please forgive me, and to little Ralph.

MR. BRADLEY: Are you finished, Eddie?

THE DEFENDANT: Yes, yes.

MR. BRADLEY: Come back and sit down.

ARGUMENT REGARDING ADMISSIBILITY OF PRESENTENCE INVESTIGATION:

[Penalty Phase Tr. at 240 ln 7-245

MR. ROSENBAUM: While we are here, I intend to call Mike Willets and offer the presentence investigation that Mr. Bradley requested be performed.

I don't know if he is going to object to that or not; but I suppose to save time we could argue it now, if the Court desires.

THE COURT: You want Willets to testify or just the report?

MR. ROSENBAUM: Well, if we can admit it without him coming, I don't care; but I was intending to call him just to testify this is his report that he made; and it's a true and accurate copy of the report requested by the

Defendant and made in his ordinary course of business.

THE COURT: Mr. Bradley

MR. BRADLEY: I object, Your Honor, to the report being admitted.

THE COURT: I think the statute says it shall be admitted.

MR. BRADLEY: I believe that it should only be admitted, Your Honor, if the report does not contain information -- there is certain information in this report that is not admissible that would be considered hearsay or that would be considered reporting of crimes that are not within the statutory boundaries of admissibility in trials and so forth; and I would ask that any information that is included in there that would be outside the rules of admissibility as far as evidence is concerned would be excluded from the report; and that the Court only

admit those sections of the report that are, in fact, admissible.

MR. ROSENBAUM: It's an interesting position he takes now, Your Honor. He is now claiming the rules of evidence apply to sentencing in their strictest form. In the beginning of this hearing, I recall Mr. Bradley arguing they did not.

In any event, I think he has opened the door to the entire report. He certainly had no compunction about asking Dr. Haglund to testify that his report was based on the hearsay in this report that Willets made; and even said, you don't think Mike Willets would deceive you about the work record.

It's my understanding he said in opening statement that he was going to argue that the Defendant had a lack of a significant record, he called it, no felonies; and this report is consistent

with his statement; but it has part of the record, and I think his record is significant; and I think I'm entitled in rebuttal to bring it in at this time.

THE COURT: Do you have any other witness except Mike?

MR. ROSENBAUM: I intend to call Mr. and Mrs. Harris, and they wouldn't be long.

THE COURT: The Court will take a short recess.

We'll rule on the motion before we proceed.

(Short recess taken.)

THE COURT: Mr. Bradley.

MR. BRADLEY: (sic) The Court will overrule your objection to the presentence report. Obviously, you have the statute also, but it indicates strongly that copies of any reports prepared under this section shall be

furnished to the trial jury. The trial jury shall consider any report made pursuant to this section, 2929.03(D)(1), and the statute makes no provision for any amending of the report.

So, the report will go to the Jury.

MR. BRADLEY: Your Honor, I would just like to state to the Court for the record that I don't believe the report entirely comports with the statute or, at least, the Criminal Rule which indicates there should be some indication in the report as to the Defendant's ability to be rehabilitated or the Defendant's ability to be assisted while incarcerated; and there is nothing in this report to that effect.

Basically, all this report does is repeat the Prosecutor's file on this case and cites the Defendant's past criminal record. Prior to preparing this report, I

went and I talked to Mike Willets because I requested a Probation Officer from Cuyahoga County to do the report.

He indicated to me that he would do his best to be objective and to prepare a report knowing that this report was being prepared for a mitigation phase in a capital murder case.

And after reviewing the report, it appears to me that, again, either he didn't have sufficient time or he simply repeated or is repeating the Police Reports and so forth; and, again, we are getting into information that is outside the scope of aggravating circumstances; and that is the information that the Prosecutor is limited to in proceeding at this phase of the trial.

And I think that the Jury should be given some type of limiting instructions on the value of this presentence

investigation report so that they don't give this particular report any undue weight because this report does not relieve the Prosecutor of his burden of proving the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

THE COURT: Anything further?

MR. ROSENBAUM: In response to that, Your Honor, I would like to say the report speaks for itself and has an awful lot of information that was not in my file and an awful lot of interviews based on the Defendant's family and stuff; and, I think the justifiable parameters in me proving that the aggravating circumstances outweigh the mitigating factors include a rebuttal of the evidence presented for mitigating factors; and I think this report goes to that.

THE COURT: The report indicates the usual that is contained in PSI Reports and victim statements, social history, criminal history, family background, some facts of the case.

These are normal things contained in a normal PSI Report; and once requested, it's madatory they go to a Jury.

Also in a case like this, the victim doesn't have a chance to give the unsworn statement such as just given by the Defendant; and the victim's statement is required by law to be contained within the PSI Report.

So, this all will be, the entire report will be given to the Jury.

MR. BRADLEY: Your Honor, the victim's statement is contained in this report because they had the benefit of the victim making a taped statement, and, as the Court is aware, I did not have the

opportunity to cross-examine the victim.

THE COURT: I mean the victim's family if I said the victim. The victim's family cannot give a statement.

So, are we ready?

MR. ROSENBAUM: I'm ready.

THE COURT: Jeffrey.

That should be marked.

(Presentence Investigation Report marked as State's Exhibit No. 1 for identification.)

(Jury returned to Courtroom.)

THE COURT: Ladies and Gentlemen, the defense has now completed its presentation of evidence.

Now we allow the (sic) State to present any rebuttal evidence that it may desire.

So, you may proceed.

[Penalty Phase Tr. at 246 - ln 11-

DIRECT EXAMINATION OF MICHAEL WILLETS BY MR. ROSENBAUM:

Q Sir, will you state your name and spell you last name for the record.

A Michael Willets, W-i-l-l-e-t-s.

Q Are you employed, sir?

A Yes, I am.

Q How are you employed?

A I'm employed as a Supervisor of the Adult Probation Department.

Q For this County?

A For this County, Lorain County.

Q Pursuant to your duties as the head of the Probation Department for Lorain County, were you requested by this Court to prepare a presentence report concerning this case and the Defendant, Ediberto Huertas?

A Yes, I was, on the 13th.

Q Do you have a copy of that report

with you?

A I have the original.

Q Sir, I'm going to hand you this folder which you have handed me, which has been marked as State's Exhibit 1.

Would you identify that for the Court and Jury, please?

A Yes, this is a presentence investigation regarding the Defendant, Ediberto Huertas, Docket No. 32753.

Q That is the original copy of your report?

A Yes, sir.

Q That report was prepared by your pursuant to your duties as the Chief Probation Officer of this County?

A Yes, it was.

Q And, in fact, it's not a copy of the original record, it is the original record itself?

A Yes, sir.

MR. ROSENBAUM: I have no further questions.

CROSS-EXAMINATION OF MICHAEL WILLETS BY MR. BRADLEY:

Q Mr. Willets, when did you start your investigation or your presentence investigation in this case?

A I was requested by the Court on Friday the 13th to come over here to give the Defendant the proper papers to start filling out.

It wasn't until Tuesday morning, since the holiday was Monday, that I actually started on the investigation; and at that point I talked with you regarding it.

Q So, it would have been a week ago last Tuesday?

A Yes.

Q Now, in your presentence investigation, there is a lot of

information that's included in this report which would be considered information that you don't have first-hand knowledge of?

A (No response).

Q In other words, hearsay?

A Such as what?

Q A Police Report that you would read?

A I would have the Police Report; but, no, I didn't have first -- it would be hearsay.

Q So that a lot of the information that is contained in this report is actually information that you received from the Prosecutor's file?

A From there and also from the official Court records or, like, Lorain Muni Court, this Lorain County Court, too, the Clerk's Office.

Q And reading the Police Reports that were in the possession of The State?

A Not only that, but also getting Police Reports from Lorain and also from the Sheriff's Department.

Q Now, I'm going to draw your attention to Page 1 of your report, in the second full paragraph; and that involves information that Elba originally gave to the Police?

A Yes, sir.

Q It states there that, "Elba stated that she has had two children by the above Huertas, but have never lived together?"

A Right.

Q That was information that Elba had given to the Police the very next day of the incident?

A Yes, either the next day or that night at the hospital, I believe, when she came back.

Q But you have no personal knowledge

of whether Elba and Mr. Huertas lived together or not?

A Yes. In my investigation, when I talked with the Defendant and also interviewed Elba, they had stated that they had lived together at different times. They didn't give me any type of length because it was an on-and-off relationship.

No, they stated they had lived together on some occasion.

Q Ycu later found out that the information that was contained in the Police Report was not, in fact, accurate, and that, in fact, they had lived together?

A On that statement, yes.

Q Now, you do review in your presentence report Mr. Huertas' prior record as a juvenile and also as an adult?

A Yes, sir.

Q Now, the information that's contained in your report, basically, is information that's reflected in the Police Reports?

A Yes, sir.

Q And you have no way of checking the accuracy of those particular reports?

A No, sir.

Q So that if a report indicated that Mr. Huertas was charged with a certain offense, a very serious offense, and later on you found out that the disposition of the case was that Mr. Huertas received a small fine or a small jail sentence, would that cause you to have any doubt about the accuracy of the Police Report?

A That's a hard question. Even though on some there was a heavier charge on it, it was reduced; so there is something

there to cause a reduction of the charge. There is no way for me to check back with the people involved in these investigations and for the memory to serve them correctly.

Q So that you could only base the information that you have in your report on the Police Report itself?

A Yes, and also from the files at the Clerk's Office.

Q But you didn't do any additional checking to find out if, in fact, the situation that was in the Police Report was not, in fact, what really happened?

A No, I didn't.

Q Isn't it oftentimes that you find out information that is in a Police Report later on turns out to be inaccurate?

A On some occasions.

Q Especially if it's based on

statements that are made by witnesses that might have an interest in the case?

A Yes, that's usually true.

Q Did you find that Mr. Huertas had any prior felony convictions on his record?

A No, I didn't.

Q Did you find that there was a period of time when Mr. Huertas did not engage in criminal activity, specifically between 1982 and up until the present offense?

A Well, as the report reflects, I believe there was a traffic and a very minor misdemeanor he was involved with in '84.

Q That would have been having an open flask or beer bottle or something in his car?

A Yes.

Q Other than that, from 1982 up until

the present offense that he was charged with, it would appear that he was a law abiding citizen?

A According to his record, yes.

Q Except for traffic offenses?

A Being traffic offenses and open flask.

Q Which means he had an open liquor bottle?

A Usually. He had an open can of beer or whatever.

Q Did you discover when his DUI offenses occurred?

A He had a DWI and other traffic offenses on 4/27/86.

Q 4/27 of '86?

A Yes.

Q Did you check to find out if he had a DUI in 1986 through the Oberlin Municipal Court?

A I checked through his driving

record and some of the others; and I couldn't find anything there. I only found -- the problem I have with the case is, normally we should send out a lot of information.

On this case, due to the amount of time, no, I didn't check with Oberlin.

Q But it would be fair to say that, at least as far as serious driving offenses, those would have taken place in 1986?

A Yes.

Q Now, you also had an opportunity to discuss this case with Dr. Haglund; is that correct?

A Yes, I did.

Q And you related information that you had to Dr. Haglund?

A Yes, I did.

Q Were you aware of the fact that Dr. Haglund had seen Mr. Huertas also in September of 1986?

A I believe I was in the possession -- the Court gave me a report that was done in September, that Mr. Haglund prepared.

Q Of 1986?

A Yes, September 26th, '86.

Q So that Dr. Haglund had not only seen Mr. Huertas recently, but had also seen him back in September?

A Yes.

Q And Dr. Haglund, in that particular report, had indicated that his feeling was that this was a crime of passion?

MR. ROSENBAUM: Your Honor, I object.

This is rebuttal; and its' hearsay for Mr. Willets to speak about what Dr. Haglund concluded.

THE COURT: Sustained as to what the doctor concluded.

Q That conclusion of Dr. Haglund is in your report?

A Yes, sir.

Q You had an opportunity to check out Mr. Huertas' work records?

A Yes, I did.

Q Would it be fair to say that up until the last year or so, he had had a spotty work record?

A Till his last job at Ferrous Metal in '85, yes, I would say he had a spotty work record.

Q Mr. Huertas did obtain some specialized training, did he not?

A Yes, he reported receiving welding training through Airco Technical Institute in Cleveland.

I sent for verification of that because they don't handle that over the phone; and I wasn't able to drive into Cleveland to get the information.

However, also during the investigation, I talked with his

grandfather, who stated that he had in his possession a degree from Airco.

It was a 6 month training in welding.

Q So, during that period of time, Mr. Huertas would have been attending school?

A Yes.

Q Then after receiving that training, then he got his employment?

A Yes, at Ferrous Metal.

Q Now, you indicated in your report that Mr. Huertas was terminated from Ferrous Metal?

A Yes.

Q What was the reason that they terminated him from Ferrous Metal?

A Due to absenteeism.

Q That would have been his absenteeism for being in the County Jail?

A Yes, sir, because he was terminated after the date he was originally placed

in the County Jail.

Q So, it was nothing about his employment at Ferrous Metal that would indicate that he had excessive absenteeism prior to this incident?

A No. In fact, they indicated that he was a reliable person.

Q Did you do any investigation into Mr. Huertas' alcohol or drug use?

A Well, I -- during the investigation, I did talk with him regarding his usage of that.

So, we did discuss it.

Q Now, Mr. Willets, you are qualified to do alcohol and drug assessments, are you not?

A Yes, I am.

Q How many drug and alcohol assessments have you done?

A Probably about 200.

Q Mr. Willets, didn't I specifically

ask you to do an alcohol and drug assessment on Mr. Huertas?

A You asked me, yes.

Q And I asked you to do that because I thought it would be important in including that in the presentence report in this case?

A Yes.

Q But you didn't do that, did you?

A No, because I wasn't ordered by the Court to do that.

Q Well, isn't it oftentimes part of your presentence investigation to conduct an alcohol and drug assessment?

A Never. We only do the alcohol and drug assessments after the Court has ordered us to do them.

Basically, we'll get a feeling during an investigation that we feel that there is an assessment needed, but the majority of time -- well, all the time

that I have ever done an assessment has been through Court Order.

Q So, you didn't do an assessment in this case even though I asked you to do one?

A No, I didn't.

Q Coming back to Mr. Huertas' prior record, it appears that many of the incidents that he was involved in concerned him getting involved in fights and being a person who was involved in this type of behavior; is that correct?

A There were 2, 2 occasions where he has a record of that, yes.

Q But the information that you have in there about the details of the fights may not be accurate?

A They are accurate in the sense that I took those from the Police Reports.

Q And you can only rely on whether the Police Reports are accurate or not?

A Yes.

Q But they did involve him being involved in fights?

A Yes.

Q And that was when he was what age? 23?

A The first one was 17. The next one was 23.

Q So, when he was 17 and 23 would be the 2 incidents when he was involved in some type of fighting situation?

A According to his criminal record, yes.

Q Now, the one at 17, that would not be an adult conviction, would it?

A No.

Q So, as an adult, he has had only one incident where he was involved in some type of fight or assault?

A In regards to him going to Court, yes. That was in '82.

Q Now, you also had some reports that, at least from one of his jobs, he may have lost his job because he was in a fight with an employee?

A 2 of them.

Q He reported to you that one of the jobs he lost because he was in a fight with an employee?

A Yes.

Q You didn't receive any confirmation from his employer on that?

A I found that was at the Ford Motor Company through ARA Services, which is cafeteria.

I talked with people at the Ford Motor Plant in Avon Lake; and after talking with the Defendant, he stated it was at the Baumhart Road plant; and I went out to them.

They have no record. They contacted their Philadelphia Office. They have no

record of him being in their employ at all.

Q The only reason that you would have information about ARA Services and him being terminated because of fighting is his own statement to you?

A Yes, he voluntarily stated that. I would have never known.

Q You don't know if he started the fight or if somebody else started the fight or it was a mutual type of thing or he and another employee weren't getting along or what the situation was?

A No, I don't.

Q We could read a lot into that; or we could not read very much into it?

A Yes.

Q But we shouldn't speculate as to what the situation is?

A No.

Q Wouldn't it be fair to say that we

shouldn't speculate about any or his prior criminal activities except for the fact as to what he was actually convicted of and what this Court actually sentenced him to?

MR. ROSENBAUM: Object to that question, Your Honor.

For one thing, I don't know who "we" is.

THE COURT: Why don't you rephrase the question.

Q Well, when you do presentence reports, okay, you're basically interested in convictions, are you not?

A Yes, sir.

Q And you are not interested in -- although you report it in your report, the key is a person is convicted or not?

A Yes.

Q It's not the crime that they are charged with, but it's the crime that

they are convicted of?

A Yes.

Q You also had an opportunity to talk to Mr. and Mrs. Harris?

A Yes, I did.

Q They felt that Elba was not telling them -- or at least, had misled their son; is that correct?

A I believe during the interview with Mrs. Harris, Mrs. Harris had indicated that.

She felt there was a problem there.

Q That her son had been misled by Elba?

A Yes.

Q And was being misled to the extent that she had indicated to their son that the relationship with Mr. Huertas had been completely broken off?

A Yes.

Q And she later found out that that

was not true?

A Right.

Q And she was upset with Elba because of this?

A Yes.

MR. BRADLEY: No further questions of this witness, Your Honor.

MR. ROSENBAUM: I have nothing further, Your Honor.

[Penalty Phase Tr. at 261
ln 11-
272
ln 24]

DIRECT EXAMINATION OF ELIZABETH HARRIS BY MR. ROSENBAUM:

Q Will you state your name, again, please, and spell it for the record, ma'am?

A Elizabeth Harris, E-l-i-z-a-b-e-t-h, H-a-r-r-i-s.

Q Where do you live, ma'am?

A 3048 Toledo Avenue.

Q Do you work anywhere, ma'am?

A No, everything that I do is volunteer.

Q Does your husband work anywhere?

A Yes, he was at US Steel; but -- he went retirement last month.

Q What's your husband's name?

A Ralph Harris, Sr.

Q Do you have children, ma'am?

A Yes, I do.

Q How many children, ma'am?

A Yes, I do.

Q How many children did you have?

A 3 of my own, 4 adopted.

Q And did you have a son who was also named Ralph Harris?

A Yes, Ralph Harris, Jr.

Q Does he have a son?

A Yes.

Q What is his son's name?

A His name is Ralph Harris, III.

Q How old is Ralph Harris, III?

A 5 years old.

Q Where does he live now?

A He's with his mother part of the time, and part of the time he's with me.

Q Where was he living on June 6th of 1986?

A He was living with me. They sent him

to me from Cheyenne, Wyoming.

Q Where is that?

A Cheyenne, Wyoming, is where he was.

Q I'm sorry. How long had he lived with you?

A Oh, about a year, about 2 years.

Q Now, I'm going to ask you to recall the events of a day that occurred the week before your son died.

Did the Defendant come to your home that day?

A Yes.

Q What did he say to you?

A I went to the door; and he asked me could he speak -- first I asked him in; and he said, no.

He said, "Could I speak with Ralph?"

MR. BRADLEY: I object, Your Honor, to this testimony.

THE COURT: Overruled.

Q And what happened after that?

A I called Ralph; and he went to the door; and he went outside with Eddie.

Q Did you overhear the conversation between the Defendant in this case and Ralph Harris, Jr.?

A Yes, I did.

Q Will you tell the Court and Jury what was said at that time?

A At the time, when he came to the house, he asked my son about Elba; and he said he couldn't work that morning, he was disturbed. He left work; and he come back to talk to him because he wanted him to leave his woman alone.

My son told him that that wasn't his woman, his woman was his wife, Arlene; and he says that she was single; and he was single. And Elba was not his woman.

So, he told him he wanted him to leave her alone; and so my son told him that he had a right to be with her; so,

he told him that he leave her alone or he was going to have to waste him, but he hated to end their friendship that way.

So, my son told him -- he squished his shoulders -- shoulders up; and he said -- oh, Jesus, Jesus.

Q What did your son say to him at that time, ma'am?

A He told him that, "You know where I live;" and turned around and came into the house.

Q So, at that time you heard the Defendant acknowledge his friendship to your son; and he wasn't going to let that stand in the way of killing him, was he?

A No.

Q Did he later come back that day, the Defendant, to your home?

A Yes.

Q What happened at that time?

A He wanted -- I went to the door

again.

And he said, "I want to talk to Ralph just one more time."

And so, Ralph -- he told him okay. And he walked on out again.

So, he said to him that Elba said she didn't want to see him any more. So, then Ralph told him, Says, "Well, Eddie, she will have to tell me herself."

And he says, "Well, it doesn't seem like you're going to give up. I still say I have to waste you."

Oh, why did he do it, Lord? Why did he do it, Jesus?

Q Mrs. Harris, can you recall if he said anything about how he fights, ma'am?

A He told him "And you know I don't fight fair." He says, "I'm going to have to waste you;" and he got in his car and took off.

Oh, Jesus, Jesus, Jesus.

Q Ma'am, were you proud of your son, Ralph Harris, Jr.?

A Oh, God, how proud I was, a child that never give me no problem, no nothing, no drinking, no smoking, nothing but go to church and come back and do his Army, work out for Karate.

Oh, God, no dope, no nothing, and he wanted to be something.

Q Does Ralph Harris, III miss his father?

A Oh, God, yes. I hate to take him to the graveyard. He always wants to go. He think he going to see his dad. Oh, dear God, please help us, help us, Lord, Jesus.

MR. ROSENBAUM: I have no other questions, Your Honor.

A Jesus.

THE COURT: Do you want to take a drink of water, Mrs. Harris?

A Oh, what a good kid. Oh, Jesus, help me. Please help me.

CROSS-EXAMINATION OF ELIZABETH HARRIS BY MR. BRADLEY:

Q Mrs. Harris, can you answer a few questions for me?

A I'll try.

Q Mrs. Harris, you know this boy, too, don't you?

A Yes, I do.

Q You have known this boy for a long time, haven't you, Mrs. Harris?

A Yes, I do.

Q Mrs. Harris, Mr. Asencio came into this Courtroom and said that he felt that your son, Ralph, was like a son to him.

Did you know he felt that way about Ralph?

A Yes, because my son cared a lot about them.

Q Did you know it hurt Mr. and Mrs.

Asencio?

MR. ROSENBAUM: Your Honor, I object to the relevancy of this; and this is also rebuttal.

MR. BRADLEY: This is cross-examination, Your Honor.

THE COURT: Overruled.

Go ahead.

A Oh, Dear Lord.

Q You know, Mrs. Harris, how much it hurt Mr. and Mrs. Asencio for what their son did to your son, don't you?

A Yes, I know what they told me.

Q And Mrs. Harris, you ask yourself every day why this happened between Eddie and your son, don't you?

A Yes, I do.

Q It's hard to figure out, isn't it?

A Yes.

Q You didn't think that this boy was capable of doing that, did you?

A No, I didn't think he would do it, anything to Ralph because they all looked up to him for karate and teaching karate and all of this.

Q And Eddie looked up to Ralph, didn't he?

A I thought he did.

Q They were good friends, weren't they?

A I thought so.

Q But, Mrs. Harris, Elba came between that friendship, didn't she?

A I would -- I guess, yes.

Q And Elba Deceived your son, didn't she?

A She deceived me.

Q She deceived you?

A Yes, my son is not here to know.

Q But she did deceive you, didn't she?

A Very much so.

Q She deceived you because she

indicated that her and Eddie had been broken up for a long time, didn't she?

A Yes.

Q And she lied about that, didn't she?

A Yes.

Q But you believed Elba?

A Yes, I did.

Q And you know, Mrs. Harris, that things may have been different if Elba hadn't lied, isn't that right?

MR. ROSENBAUM: Objection, Your Honor. She doesn't know.

THE COURT: Sustained.

A I don't know.

MR. ROSENBAUM: Speculation.

A I don't know. I don't know.

Oh, Dear Lord.

Q I know this is hard for me to talk to you about this. I know you don't want to talk about it any more, but, Mrs. Harris, you went and answered that door

when Eddie came back, didn't you?

A Yes, I did.

Q Mrs. Harris, you didn't ask Eddie, Eddie, why did you threaten my son, did you?

A No, I did not ask him that.

Q Mrs. Harris, you didn't ask him because you didn't think his threat was serious, did you?

A Yes, I did, because I had heard before my son got here that he was going to kill him in Lorain.

Q I'm sorry.

A I heard before he got -- my son arrived that he was going to kill him if he got in Lorain.

That was already in Lorain.

Q Prior to Ralph --

A Before all of this.

Q Prior to Ralph even coming home from leave?

A That was in Lorain before Ralph ever got here from Korea.

Q That's rumors that you heard?

A That was rumors.

Q Well, Mrs. Harris, Elba testified that there was nothing between her and Ralph until he had been home an entire week?

A Well, I don't know nothing about whatever she said because the things she said is so different since we have been in Court until -- I don't know.

Q She has told a lot of different things, hasn't she?

A Yes, indeed.

Q Mrs. Harris, did you know that Ralph and Eddie had met at Elba's place?

A No, I didn't, because --

Q You didn't know about that, and that they had shook hands over there?

A I did not know anything about it.

Q But you didn't say anything to Eddie when he came back about why he had threatened your son?

A No, I didn't.

Q Where is Ralph, Jr. living now, Mrs. Harris?

A Ralph Jr.'s in the grave.

Q I'm talking about his son.

A Ralph, III is his son.

Q Where is he living now?

A He is with his mother part of the time, and he's with me.

Q Where does she live?

A Root Road with her mother since this has happened.

Q You are having some problems with her also, aren't you?

A Not a problem that I can't handle.

Q But, there is a problem?

MR. ROSENBAUM: Objection.

THE COURT: Sustained.

Q Mrs. Harris, you have indicated to Mr. Rosenbaum; and you have indicated to Mr. Willets, that you don't want Eddie to get the death penalty, haven't you?

MR. ROSENBAUM: Objection.

THE COURT: Overruled.

A I told Mr. Rosenbaum that I am not the Judge and I'm not the Jury; and it's up to the Courts.

Q But you don't want him to get the death penalty, do you?

A And God; and that's what I mean.

Q But you don't want him to get the death penalty, do you?

MR. ROSENBAUM: Your Honor, she answered the question.

THE COURT: Sustained.

Q Did you answer my question, Mrs. Harris?

A Yes, I did.

Q Mrs. Harris, did you think of Eddie

Huertas as a son, also?

A Yes, I thought of all of them the same way.

Q They were all that close?

A Because I loved all the kids that was at my house.

Q As a Christian, you have the ability to forgive?

MR. ROSENBAUM: Objection.

THE COURT: Well, overruled.

Go ahead.

A As a Christian.

MR. BRADLEY: Thank you, Mrs. Harris.

REDIRECT EXAMINATION OF ELIZABETH HARRIS

BY MR. ROSENBAUM:

Q Did you answer, ma'am? were you done? Was that your whole answer?

A Beg your pardon?

Q Was that your whole answer to his question?

A As a Christian. That's what I said.

Q All right.

Ma'am, does it hurt the Asencios like it hurts you?

MR. BRADLEY: Objection.

A It couldn't have.

MR. BRADLEY: Speculation, Your Honor.

THE COURT: Overruled.

MR. ROSENBAUM: Well, he asked if she knew how much it hurt them; and I just wanted to follow that up.

THE COURT: Go ahead.

A What did you say?

Q Mr. Bradley asked you if you knew how much the Asencios hurt for the loss of your son. Now, I'm asking you: do they hurt like you do?

A No, they can't, because they still have Eddie; and I don't have Ralph.

MR. ROSENBAUM: I have no other

questions.

MR. BRADLEY: I have nothing further, Your Honor.

THE COURT: Thank you, Mrs. Harris. You may be excused.

[Penalty Phase Tr. at 273
ln 15-
277
ln 9]

DIRECT EXAMINATION OF RALPH HARRIS, SR.

BY MR. ROSENBAUM:

Q State your name, sir.

A Ralph Namon Harris, Sr.

Q Are you the father of Ralph Harris, Jr., who is the victim in this case?

A Yes, sir, I am.

Q Si I have one question to ask you.

Mr. Bradley asked your wife if she wanted to see this man get the death penalty for what he did to your son?

MR. BRADLEY: Objection.

Q Do you have an opinion on that?

A Yes.

MR. BRADLEY: Objection.

THE COURT: Overruled.

Go ahead.

Q Do you want to see this man go to the chair for what he did to your son?

A He -- he took a life.

Yes, I do.

MR. ROSENBAUM: I have no other questions.

CROSS-EXAMINATION OF RALPH HARRIS, SR. BY MR. BRADLEY:

Q Mr. Harris, you feel that was because he took your son's life, don't you?

A (No response).

Q Isn't that true?

A Yes.

Q I mean, that's never happened to me. My daughter has never been taken away from me; but I'm sure I would feel the same way as you do. Okay. I understand that.

MR. ROSENBAUM: Your Honor, I ask that that be stricken.

It's not a question.

THE COURT: Sustained. Go ahead. Just ask a question.

Q Mr. Harris, you understand that it's not your decision in this case?

Do you understand that?

A Yes, I understand that.

Q You can't be the person who gives or metes out justice in this case.

Do you understand that?

A Yes, I do.

Q You understand, Mr. Harris, that this was an incident over a girl?

A It wasn't no incident. He killed him. He came to my house twice.

Q Did you hear that conversation?

A No, I did not. I was --

Q You were cutting the lawn?

A Right.

Q The lawn mower was going?

A Yes.

Q It was a power mower?

A Yes.

Q But you didn't hear that?

A Didn't hear what?

Q The conversation?

A No.

Q Did your wife tell you about it after the first time Eddie was there?

A No, I was -- first time I was in the yard cutting the grass.

Q So, she didn't tell you that she had heard it the first time?

A Not then, no.

Q Mr. Harris, your wife indicated that this boy was like a son to you and your wife, also?

A Yes, until this happened, yes.

Q Until this happened; but he was like a son?

A I said until this happened.

Q You knew that your son was very

close with the Asencios, also?

A I don't know.

Q You didn't know that?

A No, I say I don't know. All I know is after this happened, I met them.

I don't know them personally.

Q You have met them after this happened?

A Yes.

Q And you know that Mr. Asencio feels bad about what happened to your son?

A Yes, he said he did.

Q He can't feel the same way you do?

A No.

Q Because you are his father?

A Right.

Q And you were proud of your son?

A Right.

Q He didn't deserve this?

A That's right. No, he did not.

My son told me, he said, "Daddy -- "

MR. BRADLEY: I have nothing further of this witness, Your Honor.

MR. ROSENBAUM: I have no other questions.

THE COURT: You are excused, Mr. Harris.

PROBATION DEVELOPMENT SECTION

ADULT PAROLE AUTHORITY

UNIT ADDRESS:

226 Middle Avenue, Elyria, OH 44035

INVESTIGATION

(X) PRESENTENCE

( ) POSTSENTENCE

Defendant: EDIBERTO (NMI) HUERTAS aka

Eddie Asencio

Address:

Lorain County Correctional Facility

9896 Murray Ridge Road

Elyria, Ohio 44035

Legal Residence:

503 W. 20th St.

Lorain, Ohio 44052

Education: 12th grade

Age: 27 Date of birth: 4-1-59

Dependents: Five (5) children

Citizenship: United States

So. Sec. No: 295-64-2149

FBI No: 729 722 R5

BCI No: A 897 966

Detainers or charges pending: None.

Codefendant's (Disposition or status of case): None.

Docket No. 32753

County: Lorain

Presiding Judge

Honorable Floyd D. Harris

Defense Counsel:

Jack Bradley

520 Broadway, 2nd Floor

Lorain, OH 44052

Prosecuting Attorney:

Jonathan E. Rosenbaum

Assistant Co. Prosecutor

226 Middle Avenue

Elyria, OH 44035

Michael B. Willets

Investigating State Probation Officer

Date Assigned: 2-17-87

Date Dictated: 2-23-87

Follow-up Date: 3-10-87

Date typed: 2-23-87

Disposition:

Date:

OFFICIAL VERSION:

INDICTMENT: Court Data:

Ct. I: Aggravated Murder

Ct. II: Aggravated Murder with Specification.

Ct. III: Aggravated Burglary with Specification.

DATE OF VERDICT: 2-13-87

VERDICT: Guilty as to amended indictment

STATUTORY PENALTY: Ct. I, Ct. II: life with no parole, with 20 full years and/or $25,000 maximum fine; life with no

parole, with 30 full years and/or $25.000 maximum fine; or death on both counts.

Ct. III: 5, 6, 7, 8, 9, 10 to 25 years and/or $10,000 maximum fine (minimum may be actual)

OHIO REVISED CODE:

Ct. I: 2903.01(A)

Ct. II: 2903.01(B)

Ct. III: 2911.11(A)(3)

AMOUNT/TYPE OF BOND: None set

DAYS IN CUSTODY: Been in custody since date of arrest 6-7-86

Ediberto Huertas

#32753

DETAILS OF THE INSTANT OFFENSE:

According to the official records of the Lorain County Prosecutor's Office and those of the Lorain Police Department, that on 6-8-86, at 3:20 PM, Patrolman Wargo of the Lorain Police Department stopped at St. Joseph's Hospital performing routine police work. At that time, he observed that there was a person that had just been admitted for a serious stab wound to the abdomen. It was learned that the victim was Ralph Harris Jr., age 26, of 3048 Toledo Avenue, Lorain, Ohio, He was brought to the hospital by an Elba Ortiz, age 24, of 1919 G St., Lorain, Ohio.

The above, Elba gave the following information: Elba stated that she has

had two children by the above Huertas, but have never lived together. (sic) Last November, 1985, Elba broke up with Huertas and started to date other men. About two weeks ago, Elba met Ralph Jr., who she had known in high school and started to date Ralph Jr. On this date, Elba and Ralph had gone out and had come over to her residence at 1919 G Street, where Ralph Jr. was to stay the night. While Ralph Jr. was over the house, the above Huertas called the house by telephone and wanted Elba to start seeing him again. Elba told Huertas that she did not want to see him anymore and further stated that she was seeing the above Ralph and that Ralph Jr. was over the house. At this point Huertas started to argue with Elba and then the telephone was hung up.

Elba then stated that while Ralph

Jr. and her (sic) were in bed, they heard the side door of the house open up. Ralph got out of bed and went to the hall where he could see the side door, which is located on the east side of the house. At this point both Ralph and Elba observed Huertas inside the house, with the side door completely open. Elba ran to the bedroom while Ralph Jr. stayed in the hallway. Elba stated that before she went into the bedroom, she did observe Huertas holding a knife and pointing the knife at her and Ralph Jr. After Elba entered her bedroom, she locked the door and heard Huertas and Ralph Jr. struggling outside in the hall. After a few minutes, Elba heard Huertas say that he had gotten Ralph Jr. and now he was going to get Elba. Huertas then started to bang on the door, doing damage to same to try to enter the bedroom, but Ralph Jr. was able

to stop Huertas, who then left the house.

After the above Huertas left the residence, the above Elba came out of the bedroom, carrying a large stick for protection and found that Ralph Jr. had been stabbed. Elba then assisted Ralph Jr. to his auto, which is owned by Ralph Sr., and trarsported Ralph Jr. to St. Joseph's Hospital for medical treatment.

The police officer talked further with Elba, who stated that the name that Ralph Jr. had given the officer, is the same person, being Huertas. Apparently Huertas had used the name Arancio while as a juvenile, (sic) but had legally changed the name to Huertas when he turned 18 years old. She also denied giving Eddie Huertas a key to her residence. On June 16, 1986, Elba Ortiz was given a polygraph examination at Richfield Office, Bureau of Criminal

Identification and Investigation regarding her statement. According to the results, it was felt that she told the substantial truth during the tests.

Due to the serious stab wound to the abdomen, the victim was being prepared for surgery. The Emergency Room Doctor, Dr. Omley, related that the victim was clear [Page 2] headed and that the police officer could talk to him for a few minutes. The statement was taped. Ralph stated that Eddie was talking to Elba on the phone. Eddie was telling Elba that he wanted her back. Ralph stated that he heard this as Elba was on the phone with Eddie. Shortly after Elba hung up the phone, Ralph heard someone coming in the door. As Ralph got out of bed, he turned the corner and Eddie was coming at him. Ralph looked up and Eddie went crazy or something. Ralph turned around and Eddie

cut him. Ralph stated that he did not see the knife until Eddie drew the knife back. After Ralph was stabbed, he related that Eddie went after Elba. Eddie then went after Ralph and tried to stab him again. Ralph identified his attacker as Eddie Asencio (Huertas). He related that Eddie's mother lives on 20th Street someplace. Ralph stated that he has known Eddie since high school days as they went to school together. He also related that he knew that Eddie had dated Elba before. Ralph related that he had just arrived back in Lorain from overseas on May 25, 1986. Ralph Harris Jr. was taken into surgery, where he remained until 13:30 hours. At 14:00 hours, the hospital staff advised police that he had died. According to the records of Dr. William Kishman, Lorain County Coroner, the records reflected that the cause of death

was a stab wound of the liver and portal vein. He ruled it a homicide.

Lorain Police Department Officers, along with Lorain County Sheriff's Department, went to 700 Glenn Oaks Apartments and found the defendant's car parked there. The officers went to Huertas' residence, Apt. 114A, and Huertas answered the door. He was advised that he was a suspect in a stabbing. He was transported to the Lorain Police Department for questioning and was later arrested for the murder of Ralph Harris Jr.

VICTIM'S STATEMENT:

This writer contacted the victim's parents, Mr. and Mrs. Ralph and Elizabeth Harris Sr., 3048 Toledo Avenue, Lorain, Ohio, on 2-17-87, during a home visit. Mr. and Mrs. Harris told this writer that they knew the defendant, because he used

to come over to the house with other friends. They stated they had raised their son to respect others and to go to church. He was the best out of the group. They felt that Elba deceived the victim, by writing him and promising that the defendant was out of the picture. However, what they heard was that Elba was still seeing the defendant. While showing pictures of the victim, their son, the victim's parents stated they are tired of rehashing over the details and wished that people would leave them alone. The father stated that since his son's life was taken, that the defendant deserves to get the death penalty. The mother, who explained that she is very religious, feels that God has the only right to punish the defendant, and that the Court should do what it has to do. They explained that their son was in the

military and that they (sic) took care of the funeral arrangements, hospital bills and etc. That the only loss of money they suffered was the towing of the father's car and also the loss of a camera from the car. While the car was being towed the father found the camera in the trunk and when he picked up the car, the camera case was empty.

Elba Ortiz, 1919 G Street, Lorain, Ohio interviewed by this writer on 2-18-86, gave the following statement regarding her relationship with the defendant and the victim and her involvement in this case. She stated that she knew the defendant for approximately 9 1/2 years and that she had two children from this relationship. [Page 3] She also knew the victim, because he would come over to see the defendant and her. Approximately two days before the victim

came home on leave, she told the defendant to leave and that she wasn't going to see him anymore. She stated that the victim told her of the defendant's past and current unfaithfulness. She felt that her relationship with the victim stared out as friendship, then became more serious. While they, Elba and the victim, were in bed, both heard something or someone come into the house. The victim turned on the bedroom light and started to leave the room, when a knife came around the door. She then heard "You got me Eddie" and then she heard Eddie say "I got to get Elba". (sic) She (sic) tried to force the bedroom door, but it was stuck. Next she heard a noise, this is where she felt the victim throw a fish stand at the defendant and it was then quiet. She came out of the room and brought her child back into the house.

She asked the victim where he was hurt and saw a large amount of blood coming from under his hand. He told her to call the police, however she did not remember the phone number. At this time, the victim told her to get the keys from his shoes and drive him to the hospital. She did this and he finally collapsed at the hospital. She stated that the defendant did not have a key to her apartment. She also stated that she felt they were going to fight sooner or later, however, didn't feel that the defendant was going to kill the victim. She felt that the defendant appeared drunk, however she did not exactly explain when and how she saw him the night of the murder. She pictured Eddie as a drinker on the weekends, to the point of what she felt was a blackout. However, when she told him that she wasn't going to see him anymore, he

started to drink all the time. In closing, she does not report any restitution in this case. However she doesn't feel he should get the death penalty.

DEFENDANT'S STATEMENT:

The defendant gave the following statement to the Lorain Police Department during questioning on 6-8-86. Ediberto was brought to the Detective Bureau where he was interviewed. He was given the standard departmental Miranda Waiver Form and asked to read it. A police officer also read it out loud to him. He was asked if he understood to which he stated that he did. The police then explained each point again and advised him that he could be facing very serious charges. He again stated that he understood his rights. He then signed the standard departmental waiver form.

Ediberto was asked forhis (sic) personal information, age, social security number, etc. He used the name Huertas. He was asked if he went by any other names. He related that when he was in high school, he used the name Ediberto Asencio. He stated that this was because he moved to New York to his grandmothers. After getting out of high school, he then used his parental surname of Huertas.

He said that most people know him as Eddie. He was asked who would know the name Asencio. He stated that after school he never used Asencio and the only ones that would know this name would be friends from school.

Ediberto was asked to explain his agenda for Friday evening up until the police arrived at his door. He related that earlier in the day, he made arrangements with a girlfriend named

Christina to go out in the evening. At first, Ediberto [Page 4] related that he and Christina went to the Hide Out Bar at Amherst Plaza. There, he saw his room mate, (sic) Daniel Lopez. He did not realize that Daniel did not go to work. He decided that he was going to drink with Daniel. The two then dropped Christina off and went bar hopping. Later, Ediberto changed the beginning of the story. He related that that story is what the two men told Christina so he could get away from her without hurting her feelings. He stated that the date was made with Christina. He found out Daniel was not going to work and the two decided to go out together. Prior to Christina's arrival, they made the story up that Daniel would find them and claim there was family problems and Ediberto had to leave.

Ediberto related that he and Christina drove to Ediberto's place using her car. There, Daniel returned using his car. After approximately fifteen minutes, Christina left and Daniel and Ediberto went out drinking. Ediberto related that the two left the residence in Ediberto's car with Daniel driving. The two then wnet (sic) to the Galeon Bar on Erie Avenue. After that, the two went to Tony J's Bar on E. 28th Street, where they stayed until the last call was made. At that time, the two then drove straight home.

Ediberto was interviewed and then Daniel was interviewed and again Ediberto was interviewed. Ediberto was told at the end of the first interview that the police would talk to Daniel and then finish the interview with him.

During the second interview,

Ediberto was told that the story about where the two were drinking were (sic) different. He related that he remembered that the two left Tony J's and went back to the Hide Out. When they arrived there, the management was calling "last call". (sic) The two then left Amherst Plaza and drove straight home. This took about fifteen minutes.

During the second interview, Ediberto was told that Daniel stated that the two used Daniel's car for the evening. Ediberto stated that that was not so. He maintained that the two used Ediberto's car with Daniel driving. He was told that Daniel stated that the bars entered was opposite as to what Ediberto said. Ediberto maintained the two went to Galeon first, Tony J's second, and then the Hide Out.

Ediberto was advised about Ralph's

condition at the time he was interviewed. He was also asked if he had stabbed Ralph. Ediberto denied both calling and stated that he was never around Ralph, nor Elba. Ediberto at one point related that Ralph and Elba went to Cleveland to a concert and were gone most of the evening. Ediberto was asked as to how he knew Ralph. He stated that the two of them were friends and that they had gone to school together. He was aksed (sic) if he had seen Ralph since he came home on leave and whether they talked about Elba. Ediberto said that he saw Ralph twice and they did talk about Elba.

He stated that he told Ralph that he was his best friend and that what he was doing was wrong. He stated that Elba was "vulnerable" and that Ralph should not see her. Ralph told Ediberto that the decision was Elba's to make. He also said

that when Ralph returned to Korea that Elba would come back to him.

Ediberto was asked about the incident where his children were locked out of Elba's house. He stated that he let them in and did not take them home as his girlfriend was living with him and he did not want the children to see this. He stated that he never had the key to the house, but found the kitchen window unlocked and entered that way. When the two girls arrived home, he left them in and left.

[Page 5] Ediberto related that Elba called him the morning after the girls had been locked out and talked to him at 3:00 in the morning. He stated that he went to her house and stayed with her on Monday. He related that Elba left for work and shortly later he left. Elba was asked about this and she denied allowing

Ediberto to come to her house at all.

He stated that he and Elba talked about her feelings towards him. He stated that she said she was mixed up and confused. This was the reason he talked to Ralph. Elba stated that at one time she talked to Ediberto about being mixed up and stated that she told Ediberto that she was staying with Ralph. She stated that she and Ediberto had been together on and off for about 9 years, but he was married, and this is what came between them. He went back to his wife.

When Ediberto was interviewed he was asked permission to search his car. He was advised that he did not have to permit this. He was given a departmental waiver form for a Consent to Search. He stated that he had no objections and permitted the search. He signed the Consent to Search.

Ediberto was asked again about Ralph and his being stabbed. He was told that he had been identified. He stated that he was with Daniel all evening, and that after leaving the Hide Out, he went straight home and "crashed out on the couch". (sic) The next thing he remembered was the police at the door.

Ediberto's car was impounded at Fritz's Garage. It was searched. In the rear area of the car (the car is a hatchback) was found a pair of Pro Keds tennis shoes. On the right shoe, there was a red substance on the bottom and outer edge. The shoes were confiscated and where (sic) sent to the lab for examination.

The defendant, Ediberto Huertas, submitted the following written statement regarding his involvement in the present offense:

"I stabbed my good friend, Ralph Harris. I had been seeing Elba Ortiz for 9 or 10 years and have two children with her. Ralph started to see Elba and I found out he was spending the night with her. I was intoxicated and very upset and I went over to Elba's house and stabbed Ralph. I am not sure why I did this because I know that Ralph did not deserve it."

The defendant gave the following verbal statement regarding his involvement during an interview at the Lorain County Correctional Facility on 2-19-87.

He stated that a girl he knew as Chris called him around 7 or 8 PM and started to discuss going out to the Hide Out Bar. SHe (sic) indicated that she would pick him up. After this time the defendant's roommate, Danny Lopez, came

in to the apartment. At this time both started drinking while waiting for Chris's arrival. The defendant then convinced Danny to stay home from work and that they would go out bar hopping. He then told Danny to call the bar and give a false story so that he could break his date with Chris. While the defendant was at the bar with Chris, Danny came to the bar with a message that one of the defendant's family was at the hospital. Chris took the defendant home, where the defendant and she stayed for about a half hour. After she left, the defendant and his roommate, Danny, [Page 6] left to go to several bars. They came back at the apartment where the defendant did some cocaine. At that time the defendant called Elba, regarding another chance. Elba said no. The defendant asked if she was with Harris. The defendant said "I

guess we're even that I made love to his wife". The phone was hung up by Elba. The defendantcalled (sic) again and the phone was hung up. He started to get angry over that Elba and he promised to use the bed only between them and the fact of his two kids. He then went over to her house and noticed Harris' car in Elba's driveway. He went into her house and got into a scuffle with Harris. Ralph said "You got me". (sic) He tried to get into Elba's bedroom door by kicking it. The defendant related that he does not remember really anything about the evening other than going out with his roommate, drinking/using drugs, then the police questioning him. However, he has heard what testimony was at the trial, other statements, and some things that he is remembering. He stated that he did not go over to the house with the intention of

stabbing Ralph but his main purpose was to confront Elba. He told of knowing the victim since 1973-74 in high school and they they (sic) were good friends. The defendant knew Ralph was seeing Elba. This was due to Elba telling him that she was going to stop seeing him and start seeing Ralph. He went to see Ralph to tell him he was going to get hurt over this relationship. He knw (sic) Ralph was very sensitive and Elba would end up hurting him. The defendant stated that he is sorry for what had happened, that a life was taken, and he did not intend to kill him or her.

PRIOR RECORD:

Juvenile.

According to the records of the Lorain County Juvenile Court, the defendant has the following record as a juvenile.

Date 6-24-76

Offense Criminal Trespass

Place Lorain

Disposition 7-13-76 unofficial hearing, placed on guidance.

On 5-2-76, the defendant along with a Hector Perez, age 16, were found inside a trailer at Sandy's Trailer Sales, West 36th and Broadway, Lorain, Ohio. Found in the defendant's pocket were keys to a new motor home parked on the lot. The defendant also had a 3" razor in his pocket.

[Date] 11-30-76

[Offense] Assault

[Place] Lorain, OH

(17)

[Disposition] 3-8-77 official hearing had with father present. Driving rights suspended for 30 days. Defendant admonished. Released from guidance on 7-1-77 due to the defendant turning age

On 10-13-76, the defendant struck a Ricky Hall, age 16, in the mouth. The victim was then thrown to the ground by a second assailant known to him as Carlos. The victim was then kicked, although in the confusion he was unable to determine who was kicking him as three other youths were said to have been present. The defendant, after first denying his involvement, finally admitted that he did fight with the victim, Hall, and hit him first.

[Page 7] Institutional/Supervision Adjustment:

The defendant was first placed on guidance on 7-13-76 for charges of Criminal Trespass. As part of his probation, he was ordered to 1) stay away from Hector Perez; 2) maintain a 10:00 PM weekly curfew, 12:30 AM on weekends; 3)

listen to his father; and 4) call his probation officer once a week. His probation was continued due to the 11/76 Assault. On 7-1-77, the defendant was released from guidance due to having turned age 18. The prognosis upon release was termed as being fair, no further adjustment information was available.

PRIOR RECORD:

Adult.

Checks made with the FBI; BCI; the Lorain County Sheriff's Department, Elyria, Ohio; the Lorain Police Department, Lorain, Ohio; and the Elyria Police Department, Elyria, Ohio; revealed that defendant has the following prior arrest history.

Date 6-22-77

(18)

Offense Attempt to Commit Breaking and Entering (M-1)

Place Lorain, OH

Disposition 10-14-77 pled guilty to reduced charges, Lorain Co. docket #20451, originally charged with Complicity to Aggravated Burglary. Sentenced six (6) months Lorain County jail, sic (sic) (6) months suspended. Fined $250.00 and costs. Good Behavior for one (1) year.

On 6-22-77, the defendant aided three codefendants (Hector Perez, David Carroll, and William Galendez), in a burglary of a home located at 3961 Gary Avenue, Lorain, Ohio, took a TV set and some stereo equipment.

[Date] 2-7-78

(18)

[Offense] Ct. 1: Disorderly Conduct; Ct. 2: Obstructing Official Business

[Place] Lorain, OH

[Disposition] Ct. 1: $200.00 fine,

$150.00 suspended; Ct. 2: $125.00 fine, $100.00 suspended.

No details available.

[Date] 10-11-78

(19)

[Offense] Carrying Concealed Weapon

[Place] Lorain, OH

[Disposition] Sentenced 30 days jail, 25 days suspended; Good Behavior one year,

On 10-11-78, while along with a codefendant, Cardona, the defendant was found to have on his person, a stilleto-type knife (switch blade).

[Date] 9-24-82

[Offense] Ct. 1: Criminal Mischief; Ct. 2: Assault.

[Place] Lorain, OH

[Disposition] Ct. 1: 10 days jail on condition of restitution and good behavior for one (1) year; Ct. 2: originally charged with Felonious

Assault, $50.00 fine and costs, 30 days/25 days suspended. Good behavior for one (1) year.

[Page 8] On 9-17-82, the defendant, while at the Citgo Gas Station, 4820 Broadway, Lorain, Ohio, attempted to knife a Mark Schrull. The defendant also kicked the rear driver's side door of the victim's father's car.

[Date] 8-3-84

(25)

[Offense] Open Flask

[Place] Lorain, OH

[Disposition] Fine waived.

No details available.

Other Convictions:

The defendant had four (4) traffic violations between 1983 and 1985, for which he was fined.

Dismissed/Nolled, and Unknown Disposition Charges:

The defendant was charged with DWI, Failure to Control, No Driver's License, No Helmet on 4-27-86 in Lorain, Ohio. According to the Lorain Municipal Court's records, the above case was dismissed with a right to refile should he be released from current county charges.

Pending Charges: None known.

Prior Institutional/Supervision

Adjustment: None known.

SOCIAL SUMMARY:

The defendant was born on 4-1-59 in Bronx, New York, the oldest of two children born to Jose and Carmen (nee Reyes) Huertas. The defendant reported his family as follows:

Jose Huertas, father, deceased.

Carmen Julie (nee Reyes), mother, age 50, 224 Bend Street, Brooklyn, New York.

Yvette Rodriguez, sister age 25, resides in New York.

The defendant stated that his parents married and that they divorced when he was 3 or 4 years old. At age 5 the defendant started to reside with his grandparents, Rafael and Miguelina Ascencio. In 1969, the defendant and his grandparents moved to Lorain, Ohio. The defendant stated that he assumed his grandparents were his parents [Page 9] and that at age 17, he learned from other sources, who his real parents were. He confronted his grandparents and was told the truth. He had contact with his mother and father and told of one occasion where he fought with his dad. The defendant reports that he (sic) father died from a knife would four or five years ago. This writer contacted the defendant's grandparents and mother on 2-20-87. This interview took place at the home of Mr. and Mrs. Rafael Asencio, 503 W. 29th

Street, Lorain, Ohio.

The defendant's mother, Carmen, was interviewed first. She stated that she never married Jose Huertas and she gave the defenant (sic) to his grandparents to raise for unknown reasons. She later married an Efrain Jaime. They had two children, Minerva (age 20), Efrain Jaime Jr. (age 19) from this union. She related that she married Jaime twice and divorced him twice. She stated that her ex-husband suffers from mental illness. In regards to the charges, she felt that the Court is discriminating due to the fact that they are only hearing bad things regarding her son and the Court did not allow the psychological and/or drug evaluation which would help in understanding what had happened. This officer also interviewed Mr. Rafael Ascencio, who is the defendant's

grandfather. He stated that they took the defendant at birth and he was raised in their home and the defendant's mother lived with them. He reported that he was raised in a very good home and was treated like their own child. He reported not knowing of any drug or alcohol usage until approximately a year ago, when the defendant was arrested for DWI. Mr. Asencio feels bad over what happened, as he knew the victim. He related that Harris would come over to spend time with the defendant and the Asencios. He believes the defendant does not know what happened and wishes that the Court try to understand him.

The defendant reports that he had two children, Melinda (DOB 1-21-78) and Shamqua (DOB 1-9-79) from a relationship with Elba Ortiz. He states that he pays $50.00 a week in child support. The

defendant reports that this relationship has been on and off for approximately 9 1/2 years. Other than an interview presented earlier in this report by Elba, she stated that she is still in love with the defendant. When asked if the defendant ever beat or threatened her, she stated no. However, a Lorain Police report dated 2-9-80 reflected that she filed a report stating that Huertas beat her about the face with his fists. This writer could find no record of formal charges ever being filed. The defendant related that with Elba,, it was an on and off again relationship with frequent arguments, and according to the defendant, their relationship was based on sex. The defendant stated that he has three (3) children, Raquael (DOB 2-20-82), Nicole (DOB 8-12-83) and Ediberto (DOB 7-17-85) from a

relationship with Arlene Marrera. This relationship occurred from 1980 through 1985. This writer interviewed Arlene Marrera on 2-20-87, at 1980 E. 30th Street, Lorain, Ohio. She stated that she and the defendant legally married (common-law) on 11-11-82, at the Lorain County Welfare Department. She felt that the defendant was a good provider and during their relationship Elba started coming around the home making advances to the defendant. She learned that the victim was corresponding with Elba and that prior to the murder, Ralph came over to her home and talked to her. He stated that he was seeing Elba but had no serious plans with her. The defendant also talked with Arlene regarding Harris seeing Elba, that Elba put their relationship on hold until Harris returned to the service. He did not

appear to be angry, just confused. She also told of the threats and harassments that Elba had said to her and explained that it still continues as of this date. The relationship between Arlene and the defendant ended in separation, [Page 10] mainly due to Elba's involvement. She also reports that the defendant only used alcohol casually when he was residing with her. However, she stated he started using other drugs when he was with Elba.

The defendant attended Admiral King High School, 2600 Ashland AVenue, (sic) Lorain, Ohio from 9/73 to 12-16-77. He entered there while in the 9th grade and left due to overage while in the 12th grade. His grades could be rated as average to below average. He was administered the Lorge Thorndike IQ Test while in the 9th grade, and his IQ score was rated at 101. No other information

was provided by the above school officials. The defendant reports that he left school after he was skipping too much school. However, a family member states that it was due to his girlfriend pending the birth of their first child. The defendant stated that in 1984, he obtained his GED from the Elyria Board of Education, under the direction of the Lorain County Ceta Program. The defendant also reports that in 1985, he attended Airco Technical Institute, 1361 E. 55th Street, Cleveland, Ohio, for a period of six (6) months. He stated that he received a certificate in welding. Inquires were sent to the above two programs and the appropriate agencies have not yet returned this information as of the date of this report. However, this writer was advised by Mr. Rafael Asencio, the defendant's grandfather, that he has

the above two certificates in his possession. The defendant stated he was never in the military service.

The defendant is a 27 year old, Hispanic male, who is 5'7" in height and weighs 150 pounds. He has brown eyes and brown hair and states he has no identifying marks, scars, tattoos on his person, The defendant rates his current health as good, stating he suffers from an old football injury to his knee. The defendant also reports that in 1986 he was involved in a motorcycle accident, which resulted in back injuries. He stated that he has used alcohol to excess. He also reported using marijuana, acid, cocaine, PCP, and speed. He stated that near the time of the instant offense he was drinking a six pack a day, plus rum, and also using other drugs. He states he has a problem with both drugs

and alcohol and reports suffering from blackouts. The defendant was examined by Dr. Thomas Haglund, W.G. Nord Center, 6140 South Broadway, Lorain, Ohio on 9-26-86.

This psychological report was due in conjunction with the defendant pleading insanity at the time of the instant offense. The findings/conclusion of Dr. Haglund's report are as follows:

"Conclusion: Based on the clinical interview w .h Mr. Huertas and a review of investigative reports completed by Patrolman Wargo and Stack and Detectives Schuster and Poli of Lorain Police Department, it is the examiner's opinion that, at the time he stabbed Mr. Harris, Mr. Huertas was not legally insane. The basis for this opinion lies in the absence of any mental disease or defect that would have impaired Mr. Huertas'

appreciation of the wrongfulness of his actions and/or his ability to refrain from committing the act. There is no clinical evidence that, at the time of the offense, he was experiencing a psychosis and related symptoms such as delusions or hallucinations that would have driven him to kill Mr. Harris or would have grossly impaired his judgment. The key ingredients in this killing appear to have been his alcohol and drug intoxication combined with [Page 11] a goodly amount of emotional arousal triggered by his earlier conversation with Elba Ortiz. Added to this was build-up of tension and frustration over a period of a couple of weeks about the fate of this unstable and conflicted relationship, one which had dragged on for a number of years. The result, when combined with drugs and alcohol, was the

tragic but all-too-familiar 'crime of passion'."

Another report regarding ORC 292.03 Imposition of Sentence in Capital Case was ordered by the Court on 2-13-87. Dr. Haglund, of the Walter G. Nord Center, is compiling this report and will be presented to the Court on 2-23-87. The defendant has never been a patient in an institution for the mentally ill.

The defendant indicated that all of his financial assets have been sold to pay for his attorney. Aside from a grant of $2,500.00 to Airco Technical Institute, the defendant reports no other financial obligations.

EMPLOYMENT:

6-7-86 to Present: The defendant has been incarcerated at the Lorain County Correctional Facility, 9896 Murray Ridge Road, Elyria, Ohio, 44035.

5-8-85 to 6-12-86: The defendant was employed at Ferrous Metal Processing Inc., 11103 Memphis Avenue, Cleveland, Ohio as a first helper - back end slitter. He earned $9.00 per hour and was terminated due to excessive absenteeism. According to company officials, they stated that (sic) following regarding the defendant. "Eddie was a reliable person who caught on to tasks well. In general he was a good employee." They also indicated that they would not consider re-employing the defendant.

4/84 to 11/84: The defendant reports employment at Cloverdale Farms, 226 Conneticut (sic) Ave., Lorain, Ohio as a laborer. He stated he earned $3.50 per hour and that this employment was through Kelly Services, 1710 Cooper Foster Park, Lorain, Ohio. This officer visited both employers who had no record of the

defendant being in their employ. The subject states that he left the above employer when he went to technical school.

4-19-82 to 10-1-82: The defendant was employed at Green Circle Growers Inc., 10310 E. River Road, Columbia Station, Ohio as a laborer in a greenhouse. According to a company spokesman, the defendant was fired from this job due to poor attitude and fighting on the job. The defendant stated that he got into an argument with a fellow employee and was dismissed.

1983: The defendant reports employment for approximatley (sic) six (6) months with A.R.A. Food Services, c/o Ford Motor Company, Baumhart Road, Lorain, Ohio as a food service worker. He stated that he earned minimum wages and was fired when he got into a fight with a fellow

employee. This writer contacted A.R.A. officials at the Ford Motor Co., Baumhart Rd., Lorain, Ohio and according to Mr. Mike Garber, he has no record of the defendant being in their employ.

[Page 12] 1978 to 1982: The defendant received General Relief and Food Stamps, from the Lorain County Welfare Department during this time span.

1977: For approximately eleven (11) months in this year the defendant reports employment at Servisteel Corp., 4920 French Creek Rd., Lorain, Ohio, as a laborer earning $3,50 per hour. The defendant reported that he was laid off from this employment. An inquiry sent to the above company has not yet been

returned to this office as of the date of this report.

Respectfully submitted,

/Signed
Michael B. Willets/
Michael B. Willets
Unit Supervisor
Elyria Unit I 2329

MBW:llo

CERTIFICATE OF SERVICE

I, Jonathan E. Rosenbaum, hereby certify pursuant to U.S. Sup. Ct. R. 28.3 that three copies of the foregoing Joint Appendix were sent to Joan Bour-Stokes, Ohio Public Defender's Office, 8 East Long Street, 11th Floor, Columbus, Ohio, 43266-0587, on this 14th day of November, 1990 by depositing the three copies in a United States mail box with first class postage affixed thereto.

JONATHAN E. ROSENBAUM
Chief Counsel,
Criminal Division

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
NOV 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

Case No. - 89-1944

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF OHIO

Petitioner,

vs.

EDIBERTO HUERTAS

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF ON THE MERITS

JONATHAN E. ROSENBAUM
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PETITION FOR CERTIORARI
FILED JUNE 11, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

I

A

QUESTIONS PRESENTED FOR REVIEW

Did the Ohio Supreme Court wrongfully interpret Booth v. Maryland (1987), 107 S. Ct. 2529, and South Carolina v. Gathers (1989), 109 S. Ct. 2207, to require exclusion of all victim testimony during the penalty phase of a capital trial and by further holding that the effect of the victim's death on the surviving family members is not relevant to the defendant's personal responsibility and moral guilt when the defendant intimately knew his victim, his victim's family, and the trauma his decision to kill would cause?

B

Does the the United States Constitution prohibit the State from offering victim impact testimony in response to and as a function of defense testimony concerning the impact execution would have upon the respondent's family?

C

Does the United States Constitution prohibit a jury from considering victim impact testimony during the sentencing phase of a capital murder trial?

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III

OPINIONS DELIVERED IN THE COURTS BELOW

State v. Huertas (1990), 51 Ohio St. 3d 22 (reprinted in the Petition for a Writ of Cert., page 1 of the Appendix).

State v. Huertas (Lorain Co. 1990), C.A. No. 4202, (reprinted in the Petition for a Writ of Cert., page 63 of the Appendix).

IV

STATEMENT OF CLAIMED JURISDICTION

Jurisdiction is invoked under:

28 U.S.C. 1257(3) and

Supreme Court R. 17.1(C)

The Ohio Supreme Court rendered its opinion on May 9, 1990 at 1:00 p.m. The Petition for a Writ of Certiorari was filed in this Court on June 11, 1990. The

Writ of Certiorari was granted on October 1, 1990.

V

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution Amendment VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Constitution Amendment XIV, Section 1

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Section 2903.01

Ohio Revised Code Section 2929.02

Ohio Revised Code Section 2929.022

Ohio Revised Code Section 2929.03

Ohio Revised Code Section 2929.04

(Revised Code Sections reprinted in the Petition for a Writ of Cert., page 116 of the Appendix).

VI

STATEMENT OF THE CASE AND FACTS

The Respondent was convicted of two counts of Aggravated Murder with various capital specifications for the killing of Ralph Harris, Jr. After the Penalty Phase, the jury recommended the death penalty. The Honorable Floyd D. Harris accepted this recommendation and imposed a sentence of death on March 10, 1987, after the statutorily required independent review.

The Ninth District Court of Appeals for Lorain County, Ohio, affirmed the conviction and death penalty after independent review in two separate

opinions, on June 6, 1988, as statutorily required. (Opinions contained in the Petition for a Writ of Cert., Appendix pages 63 and 111.)

The Ohio Supreme Court vacated the death penalty, but affirmed the conviction. They remanded the case for re-sentencing in an opinion rendered on May 9, 1990, at 1:00 p.m. (This opinion is contained in the Petition for a Writ of Cert., Appendix page 1.)

A Stay was obtained from the Ohio Supreme Court pending appeal to this Court. A Petition for a Writ of Certiorari was filed on June 11, 1990. A Writ of Certiorari was granted by this Court on October, 1, 1990.

Ediberto Huertas (the Respondent), Ralph Harris, Jr. (the victim), and Elba Ortiz all grew up together, attended school together, and were very close

friends. Each new the others' family intimately. J.A. 2, 17-20, 29-30, 34-38, 43-44, 57-58, 61-64, 82-89, 91-94, 134-136. Ralph Harris, Jr. eventually married and had a son, which the Respondent was well aware of. J.A. 128. Ralph Harris, Jr. enlisted in the Air Force and attained the rank of Sergeant. J.A. 3. While away on duty, Elba Ortiz and the Respondent corresponded with him. J.A. 33, 39-40. Elba Ortiz, the Respondent, and the victim would visit while the victim was home on leave. J.A. 54, 57-58. This included socializing with the victim's son, Ralph Harris, III. J.A. 54.

The Respondent had two children with Elba Ortiz, but married another. J.A. 29. The Respondent and Elba Ortiz were still involved up until the time of the murder of Ralph Harris, Jr. J.A. 29, 136-137.

Friction between the three friends developed when Ralph Harris, Jr. returned home on leave and began to date Elba Ortiz. J.A. 15-16, 30-32, 43-46. This classic and tragic struggle led the Respondent to actually threaten to "waste" Ralph Harris, Jr. at Harris' parents' home several days prior to his death. J.A. 5-12, 41-47, 129-132, 147-148. The Respondent admitted that this confrontation took place at the victim's parents' home, and that he had knowledge that the victim's parents were there at the time. J.A. 41-47.

Despite his intimate knowledge of the victim's family, the Respondent decided to kill Ralph Harris, Jr. He fatally stabbed Ralph Harris, Jr. and attempted to stab Elba Ortiz after breaking into Elba Ortiz's home to accomplish his purpose. R. 664-666.

The victim gave a taped statement prior to his death, which is admitted into evidence, concerning these events. State's Ex. 13. R. at 735. The Respondent did not deny the stabbing, and stated he must be responsible. R. 838.

Based upon the evidence adduced at trial, the Respondent was convicted. At the Penalty Phase, the defense called members of the Respondent's family, not only to describe the relationship between the Respondent and the victim, but also to demonstrate their love for the Respondent.

The Respondent called Arlene Huertas, the Respondent's common-law wife, as his first witness. She testified to her and their children's love for the Respondent. J.A. 48-54. She testified that her daughter wanted to see and hold the Respondent, but was unable to. J.A.

55-6. The State countered this assertion on cross-examination by asking if Ralph Harris, III would like to hold his father. J.A. 59. The defense also raised the implication that the deceased would want the Respondent to be able to hug the Respondent's daughter. J.A. 60.

The Respondent next called his sister, Carmen Flores. She testified to the family relationship and about who raised her and the Respondent. J.A. 61-67, 70. She testified to the Respondent's relationship with his children and their mutual love. J.A. 68-69.

The third witness in the Penalty Phase called by the Respondent was Ralph Asencio, who along with his wife, raised the Respondent. J.A. 71-72. He testified to a father's pride in his son. J.A. 73, 89-90. He testified at length to his

relationship and contact with Elba Ortiz and the children she had with the Respondent. J.A. 73-77. Ralph Asencio also testified about the relationship with the Respondent's children he had with Arlene Huertas. J.A. 79-80.

After other witnesses testified on behalf of the Respondent during the Penalty Phase, the State called three (3) witnesses. The first was Michael Willets. He was the supervisor of the Adult Probation Department who prepared the presentence report concerning the Respondent. J.A. 104-106. This report is contained in the Joint Appendix at 151. After Mr. Willets identified his report, the defense extensively cross-examined him regarding nearly every aspect of the report. J.A. 106-126.

The defense, despite this lengthy cross-examination, did object to the

admittance of the report, but not because it contained victim impact testimony. The objections concerning this report are contained in the J.A. at 96-97, 99-101, 102-103.

In an effort to maintain its burden at the Penalty Phase, the State next called the victim's mother, who was present when the Respondent threatened to "waste" the victim. J.A. 127-132. Her complete testimony is in the Joint Appendix at 127-144. She testified about her family and to the existence of the victim's son without objection. J.A. 127-129.

The defense cross-examined Mrs. Harris and elicited comments concerning how the Respondent's family felt about the victim (J.A. 134) and if the victim's mother was aware of how much this senseless murder had hurt the

Respondent's parents. J.A. 134-5. Unprovoked and out of the blue, in an effort to spare the Respondent's life, the defense asked the victim's mother if she wanted the Respondent to suffer the death penalty. The wording of the question and the answer inferred that she had previously stated she did not. J.A. 141-142. To counter this implication, the State called the victim's father, Ralph Harris, Sr., who stated that he desired the Respondent to suffer the death penalty. J.A. 145-146.

VII

ARGUMENT SUMMARY

A

The Ohio Supreme Court misinterpreted Booth v. Maryland (1987), 482 U.S. 496, 107 S. Ct. 2529 and South Carolina v. Gathers (1989), 490 U.S. _____, 109 S. Ct. 2207 when it barred the victim impact evidence adduced in this case. Booth v. Maryland, supra, and South Carolina v. Gathers, supra, permit the introduction of victim impact evidence when related to the circumstances of the crime and, therefore, the personal responsibility and moral guilt of the offender.

Victim impact evidence concerning the victim's surviving relatives who were personal acquaintances of the offender prior to the decision to kill, are relevant to the offender's personal

responsibility and moral guilt. Therefore, the victim impact evidence adduced in this case was admissible pursuant to the holdings in both Booth and Gathers.

B

Regardless of whether the offender personally knew the victim's family prior to the decision to kill, the victim's surviving family may constitutionally be permitted to testify in rebuttal to all matters that the offender's family and the offender testified to. If the offender and/or his family testified to familial love and the potential loss to the family that his execution would cause, the State may rebut the testimony by placing the victim's survivors on the stand to testify about the familial love in their family, and their actual loss.

The parameters set by the testimony

of and concerning the offender's family should define the limits the State may go to in rebuttal of this evidence.

C

The history of capital litigation in the United States reveals that the discretion granted to juries as to when to impose the death penalty was a response to juries refusing to mandatorily impose the death penalty. Based upon this and our affirmed faith in the jury system, it is not logical nor constitutionally required to conclude that jurors can not rationally deal with victim impact evidence in the Penalty Phase of capital litigation.

The same dignity for human life that requires the Eighth Amendment to be interpreted by this Court to prohibit the arbitrary and capricious infliction of the death penalty, compels us to

recognize the suffering and grief of the victim's family, especially if the offender is personally acquainted with the victim's family, prior to his decision to kill.

Juries can not express the public's outrage, remorse, and right to retribution based upon current values if they are not apprised of the circumstances of the particular offense which permissibly includes victim impact evidence. Consideration of victim impact by a sentencing jury is a constitutionally indispensable part of the process of inflicting the death penalty because the Constitution requires the circumstances of the particular offense to be considered.

VIII

ARGUMENT

A

The Ohio Supreme Court held in this case that introduction of victim impact evidence in the penalty phase of a capital trial is constitutionally impermissible.

> In Booth v. Maryland (1987), 482 U.S. 496, decided after the trial of the instant case but before the court of appeals issued its opinion, the United States Supreme Court held that introduction of victim impact evidence in the penalty phase of a capital trial is constitutionally impermissible.

State of Ohio v. Huertas (1990), 51 Ohio St. 3d 22 at 24. Pet. for Writ of Cert. Appendix at 11-12.

In a dissenting opinion, Justice Douglas pointed out that the majority had wrongfully interpreted Booth v. Maryland (1989), 482 U.S. 496, 107 S. Ct. 2529 and

South Carolina v. Gathers (1989), 490 U.S. _____, 109 S. Ct. 2207 to preclude all victim impact evidence under any circumstances.

> DOUGLAS, By stating"*** the Booth [v. Maryland (1987), 482 U.S. 496] court held that the admission of victim impact evidence in the sentencing phase of a capital jury trial is constitutional error," and "*** Booth prohibits consideration of victim evidence," today's majority creates a constitutional ban on the admission of any victim impact evidence and, thereby, the majority contravenes the express language in Booth.
>
> ***
>
> South Carolina v. Gathers (1989), 490 U.S. _____, 104 L.Ed. 2d 876, 109 S. Ct. 2207, was decided shortly after Booth. In the case at bar, the majority views Gathers as mere application of the constitutional standards announced in Booth. I disagree. Gathers further explained the tenth footnote in Booth. Therefore, Gathers should have dispelled any belief that Booth created a constitutional ban on the use of victim impact evidence, or that the use of any such evidence is constitutionally impermissible.

State v. Huertas (1990), 51 Ohio St. 3d 22 at 33-35. Pet. for Writ of Cert. Appendix at 47-48.

A reading of South Carolina v. Gathers, supra, at _____, 2211 reveals that this Court prohibited the use of victim impact evidence only when the murderer was not aware of the circumstances surrounding the victim and they could not be relevant to the offender's personal responsibility or moral guilt. This Court specifically stated, "Our opinion in Booth, however, left open the possibility that the kind of information contained in victim impact statements could be admissible if it 'relate[d] directly to the circumstances of the crime.'" South Carolina v. Gathers, supra, at _____, 2211.

This Court went on to examine whether Gathers had knowledge of the

victim impact evidence offered (i.e.Game Guy's Prayer and voter registration card.) Finding that there was no evidence in the record to support South Carolina's contention that Gathers read or was aware of the victim impact evidence, this Court reasoned the evidence could not relate to the circumstances of the crime. Gathers, supra, at _____, 2211. The existence of the inquiry as to whether Gathers read the victim impact evidence, or was aware of it, clearly demonstrates that this Court meant what it said when it held that this type of evidence is admissible if it relates directly to the circumstances of the crime and/or the decision to kill.

Despite this clear language and the analysis set forth in Gathers, the majority of the Ohio Supreme Court held that:

> In most cases, the mere fact that the killer knows his victim does not make him more or less deserving of the death penalty. For example, if appellant and Ralph Harris had not been friends, and all other circumstances had been the same, we doubt that anyone would consider the crime less heinous. In order to bring in victim impact evidence under the "circumstances of the crime" exception to Booth, the state must show a connection to the defendant's "personal responsibility and moral guilt."

State v. Huertas, supra, at 26. Pet. for Writ of Cert. Appendix at 19-20.

In so holding, the majority of the Ohio Supreme Court has ruled that the tragic impact the decision to kill has upon surviving family members, even though known to the murderer, is of no consequence and can not make the crime more heinous. The State of Ohio vehemently disputes this conclusion. This is unfathomable in today's society. The current impetus is to include victims and

their survivors in our system of justice, and to make our system of justice address and redress their losses.

Simply put, the majority of the Ohio Supreme Court has held it is no more heinous to kill a person who has survivors the offender knows will suffer for the rest of their lives, than it is to kill a human being whose death will have no known impact. The Ohio Supreme Court has ruled that an offender's callous disregard for the victim's family he personally knows does not even merit consideration. Logic and the same dignity demanded by human life, which gives rise to Eighth Amendment protection for murderers prohibiting cruel and unusual punishment, demands that this grievous and fully anticipated suffering be recognized by the courts.

This recognition is not prohibited

by the Constitution of the United States of America because the known suffering that this type of decision to kill causes is relevant to the personal responsibility and moral guilt of the offender, as set forth in Booth v. Maryland, supra, and South Carolina v. Gathers, supra.

The victim impact evidence in this case was contained in the Presentence Investigation and adduced through testimony of the victim's mother and father. It does not deal so much with the personal characteristics of the victim, but rather with the known impact the decision to kill would have on survivors the Respondent intimately knew. As such, the testimony in this case is vastly different from that in Booth and Gathers. There is no lengthy documentation of the extensive devastation of surviving

relatives that could not be subjected to cross-examination. The testimony here was brief and the surviving victims were cross-examined. There was little comment about the survivors of the victim in closing, unlike the "sterling victim" lengthy argument in Gathers. The references to the victim impact testimony in closing were contained on two pages. Penalty Phase R. at 294, 312.

It is relevant to the offender's personal responsibility and moral guilt that he not only elected to kill, but elected to do it despite the known suffering of survivors with whom the Respondent is and was intimately acquainted. From a purely logical point of view, one can learn nothing about the "soul" of a murderer who is unaware of his victim's family, but much can be gleaned from a decision to kill made

despite knowledge that the victim had a family the murderer intimately knew.

The fact that the Respondent elected to cause a three year old son to grieve for and be deprived of fatherly love for the rest of his life clearly says something about what type of individual the Respondent is. A heedless indifference to Ralph Harris, III's loss is illustrative of the Respondent's character and is, therefore, relevant to his personal responsibility and moral guilt. The decision to kill another human being necessarily involves all the prior knowledge the offender has about the victim and intimately known relatives.

There can be no dispute that the Respondent intimately knew the Harris family. The Respondent and the victim grew up together. J.A. 2, 17-20, 29-30, 34-38, 43-44, 57-58, 61-64, 82-89, 91-94,

134-136. Each frequented the other's house for years. J.A. 82-84. The Respondent and his children socialized with the victim and his son. J.A. 54. Their families were intimately acquainted for years. J.A. 82-86. The victim even participated in the Respondent's sister's wedding. J.A. 63.

Certainly, if the offender's reading of the "Game Guy's Prayer" prior to killing the victim in South Carolina v. Gathers, supra, would have been relevant to Gathers' personal responsibility and moral guilt, the intimate knowledge of the Harris family possessed by the Respondent and the resulting certain traumatic impact the decision to kill would have was relevant to the Respondent's personal responsibility and moral guilt. How could it not be?

B

The State urges this Court to carefully examine what is actually happening in the penalty phase of capital litigation and in that context to define the State's role in rebutting evidence of mitigation. The parameters which define what type of evidence the State may offer to counter mitigation should be a function of the the evidence offered by the Defendant.

> [T]he State has a legitimate interest in counteracting the mitigating evidence which a defendant is entitled to put in,...by reminding the sentencer that, just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.

Booth v. Maryland (1987), 482 U.S. 496 at _____, 107 S. Ct. 2529 at 2540. (White, J., dissenting).

Why is it relevant for a capital

litigation sentencer to consider the love a murderer has for, and receives from, his family and the implicit loss they will feel for each other if death is imposed, but it is not relevant to consider the same love and loss suffered by the victim's family? The loss suffered by the victim and his family is also necessary for and relevant to an individualized "consideration of the 'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death,' Woodson v. North Carolina, 428 U.S. at 304, 96 S. Ct., at 2991." Lockett v. Ohio (1978), 438 U.S. 586 at 601, 98 S. Ct. 2954 at 2963.

Why is it that the familial love of and the potential loss to the murderer's

family has any more bearing on the "character and record of the individual offender or the particular circumstances of the offense" than the victim's familial love and their actual loss? In our efforts to live up to the dictates of the Eighth Amendment, our system of justice has created the need to individually sentence the offender based upon his character, record, and the circumstances of the particular offense. By prohibiting victim impact information we refuse to take countenance of <u>all</u> the circumstances of the particular offense.

It is undeniable that when a murderer parades his family before the sentencer and they speak of familial love and the existence of young children, the defense is pleading whether directly or implicitly, for mercy because the impact of a death sentence will weigh greatly

upon their lives.

This Court has held that this type of testimony should and must be permitted in the penalty phase when offered on behalf of the murderer. Mitigation factors can not be limited. Eddings v. Oklahoma (1982), 455 U.S. 104, 102 S. Ct. 869; Lockett v. Ohio (1978), 438 U.S. 586, 98 S. Ct. 2954. When an offender offers this type of evidence, the State should be constitutionally permitted to respond in kind, whether the offender was aware of it at the time he made his decision to kill, or not.

In this case, the Respondent offered the testimony of his wife regarding their love and that of their children. J.A. 50, 55-6. The Respondent further made a vile and disgusting attempt to smear the victim, through this same witness. Penalty Phase R. 71.

The Respondent's wife further testified as to how one of their daughters longed to hold their father. J.A. 55-56.

The Respondent called his sister, Carmen Flores, to the stand to tell of their familial love and the relationship the Respondent had with his nephews. J.A. 61-70. This sister testified that the Respondent loved his children. J.A. 68-69.

Ralph Asencio was the man who raised the Respondent and acted as a father to him. He testified during the penalty phase about his love for his son and his family, as well as the pride he felt in the Respondent as a son. J.A. 71-80, 89. He testified about the Respondent's children. J.A. 74-76, 79-80.

To counter these assertions and to provide further evidence concerning the

"character and record" of the Respondent and the particular circumstances of the offense, the State offered the Presentence Investigation. J.A. 151. Admittance of this report was objected to, but not because it contained victim impact evidence unrelated to the decision to kill. J.A. 96-7, 99-101, 102-103. It was prepared at the request of the defense. J.A. 95. This report does contain some victim impact testimony. Despite this objection, the defense extensively cross-examined the preparer of the report at the penalty hearing. J.A. 106-126.

The State called the victim's mother, Elizabeth Harris, to further counter the evidence offered by the Respondent during the penalty phase. Mrs. Harris testified to the threats the Respondent made against the victim in her

presence to demonstrate motive and premeditation in an effort to rebut the unsworn statement of the Respondent. J.A. 129-133. She also testified to the existence of the victim's son. J.A. 128.

The defense during cross-examination established that the death of Mrs. Harris' son not only hurt her, but the Respondent's parents as well. J.A. 134-5.

The State offered evidence to establish that Ralph Harris, III would like to hold his father, just as the Respondent's daughter desired. J.A. 133. Mrs. Harris was also asked if she were proud of her son, just as Ralph Asencio was asked if he were proud of the Respondent. J.A. 133.

The defense asked the following questions:

> Q Mrs. Harris, you have indicated to Mr. Rosenbaum; and you have indicated to Mr.

Willets, that you don't want Eddie to get the death penalty, haven't you?

MR. ROSENBAUM: Objection.

THE COURT: Overruled.

A I told Mr. Rosenbaum that I am not the Judge and I'm not the Jury; and it's left up to the Courts.

Q But you don't want him to get the death penalty, do you?

A And God; and that's what I mean.

Q But you don't want him to get the death penalty, do you?

MR. ROSENBAUM: Your Honor, she answered the question.

THE COURT: Sustained.

Q Did you answer my question, Mrs. Harris?

A Yes, I did.

Q Mrs. Harris, did you think of Eddie Huertas as a son, also?

A Yes, I thought of all of them the same way.

Q They were all that close?

A Because I loved all the kids that was at my house.

Q As a Christian, you have the ability to forgive?

MR. ROSENBAUM: Objection.

THE COURT: Well, overruled.

Go ahead.

A As a Christian.

J.A. 141-142.

The phraseology of this question and

its ensuing dialogue clearly implies to the sentencing jury that Mrs. Harris did not want the Respondent to suffer the death penalty. The State countered this tactic in the only way that it could. The State called the victim's father to indicate that he felt the ultimate penalty was appropriate. J.A. 145-146.

This Court has interpreted the United States Constitution to permit murderers the opportunity to offer any evidence they desire if it remotely reflects upon mitigation. The same Constitution should not be interpreted to prohibit the State from a fair opportunity to rebut the evidence so offered. Once the defense has defined the parameters of the evidence to be offered at the penalty phase, the State should be able to counter within the same parameters.

If this "function" type argument is adopted by this Court, trials will not venture as far of field as this one did because the defense will realize it does not have the unbridled discretion to offer any sympathy generating evidence in support of mitigation without the State being able to put this evidence in perspective by responding in kind.

C

In Booth v. Maryland (1987), 482 U.S. 496 at _____, 107 S. Ct. 2529 at 2535- 2536 this Court opined:

> We thus reject the contention that the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics, are proper sentencing considerations in a capital case.
>
> ***
>
> As we have noted, any decision to impose the death sentence must "be, and appear to be" based on reason rather than caprice or emotion. [citation omitted]. The admission of these emotionally-charged opinions as to what conclusions

> a jury should draw from the evidence clearly is inconsistent with the reasoned decision-making we require in capital cases. [footnotes omitted].

The reasoning is obvious. The majority of this Court felt that juries could not rationally deal with such trauma laden evidence. Therefore, a niche was carved out of the criminal justice system solely in capital litigation wherein the sentencing jury can not hear of the damage the offender caused, except if the offender were personally aware of the individual whose experiences comprise the victim impact evidence.

Modern capital litigation in the United States, as shaped by this Court's interpretation of the Constitution, clearly and justly tells us that, if the death penalty is to be exacted, it can not be imposed arbitrarily and capriciously. Accordingly, imposition of

the death penalty can only result after and individualized consideration of the offender. Woodson v. North Carolina (1976), 428 U.S. 280, 96 S. Ct. 2978; Furman v. Georgia (1972), 408 U.S. 238, 92 S. Ct. 2726.

This individualized consideration and the underlying constitutional interpretations were designed to insure the fair and nonarbitrary imposition of the ultimate penalty. These holdings resulted from jurors indiscriminately imposing the death penalty based upon statutes that granted the jurors too much discretion and too little guidance. Furman v. Georgia, supra.

> By the time of our decision in Furman v. Georgia, [citation omitted] the country had moved so far from a madatory system that the imposition of capital punishment frequently had become arbitrary and capricious.

Eddings v. Oklahoma (1982), 455 U.S. 104

at 111, 102 S. Ct. 869 at 875.

It may be time to examine what caused such vast discretion to be placed in the hands of a capital-sentencing jury, thereby requiring statutes with constitutionally acceptable levels of "built in" guidance. The underlying circumstance that caused this vast discretion to be given to jurors was the refusal of juries to blindly and automatically impose the death penalty regardless of what the law required.

> Almost from the outset jurors reacted unfavorably to the harshness of mandatory death sentences. The States initially responded to this expression of public dissatisfaction with mandatory statutes by limiting the classes of capital offenses.
>
> This reform, however, left unresolved the problem posed by the not infrequent refusal of juries to convict murderers rather than subject them to automatic death sentences. In 1794, Pennsylvania attempted to alleviate the undue severity of the law by confining the madatory death penalty to

"murder of the first degree" encompassing all "wilful, deliberate and premeditated" killings. Pa.Laws 1794, c. 1766. Other jurisdiction, including Virginia and Ohio, soon enacted similar measures, and within a generation the practice spread to most of the States.

Despite the broad acceptance of the division of murder into degrees, the reform proved to be an unsatisfactory means of identifying persons appropriately punishable by death. Although its failure was due in part to the amorphous nature of the controlling concepts of willfulness, deliberateness, and premeditation, a more fundamental weakness of the reform soon became apparent. Juries continued to find the death penalty inappropriate in a significant number of first-degree murder cases and refused to return guilty verdicts for that crime.

The inadequacy of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense led the States to grant juries sentencing discretion in capital cases. Tennessee in 1838, followed by Alabama in 1841, and Louisiana in 1846, were the first States to abandon mandatory death sentences in favor of

> discretionary death penalty statutes. This flexibility remedied the harshness of mandatory statutes by permitting the jury to respond to mitigating factors by withholding the death penalty.
>
> ***
>
> The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. [footnotes omitted].

Woodson v. North Carolina (1976), 428 U.S. 280 at 289-293, 96 S. Ct. 2978 at 2984-2986.

The culmination of what started out to be a reaction to juries refusing to impose the death penalty has resulted in depriving these same juries of victim impact evidence because we fear they can not hear such evidence and rationally and dispassionately perform their functions. This conclusion is obviously reached despite the fact that it is the end

result of American juries refusing to impose the death penalty.

> As recently as McGautha v. California, 402 U.S. 183, 91 S. Ct. 1454, 28 L.Ed2d 711 (1971), the Court had specifically rejected the contention that discretion in imposing the death penalty violated the fundamental standards of fairness embodied in Fourteenth Amendment due process, id., at 207-208, 91 S.Ct., at 1467, and had asserted that States were entitled to assume that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision." [citation omitted].

Lockett v. Ohio (1978), 438 U.S. 586 at 598, 92 S. Ct. 2954 at 2961.

A properly selected capital jury can function dispassionately and fairly under these conditions even if they hear victim impact evidence. Grief from this type of tragic loss is a part of our human experience, of which every juror is aware. Another's grief can be put into

perspective by an independent sentencing jury. If it can not, juries would not have historically refused to apply the death penalty in inappropriate situations as so often documented by this Court.

The requirement of mandatory independent review by all levels of the court system in Ohio to determine if the death penalty has been proportionately applied should also alleviate these concerns.

> The provision for appellate review in the ... capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

Gregg v. Georgia (1976), 428 U.S. 153 at 206, 96 S. Ct. 2909 at 2940.

This dichotomy is further compounded by another role that a sentencing jury must historically play in capital litigation. The jury must express the public's outrage and vent its grief in order to maintain the public's faith in our system of justice. How can a jury express the public's remorse, outrage, and right to retribution if the jury is forbidden from considering the harm a murderer has caused?

> Coker [v. Georgia (1977), 433 U.S. 584, 97 S.Ct. 2861] teaches, therefore, that proportionality - at least as regards capital punishment - not only requires an inquiry into contemporary standards as expressed by legislatures and jurors, but also involves the notion that the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness.

Enmund v. Florida (1981), 458 U.S. 782 at 815, 102 S.Ct. 3368 at 3386.

> The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.
>
> In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
>
> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy--of self-help, vigilante justice, and lynch law." Furman v. Georgia, supra, 408 U.S., at 308, 92 S. Ct., at 2761 (Stewart, J., concurring).
>
> "Retribution is no longer the

> dominant objective of the criminal law," Williams v. New York, 337 U.S. 241, 248, 69 S.Ct. 1079, 1084, 93 L.Ed. 1337 (1949), but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. Furman v. Georgia, 408 U.S., at 394-395, 92 S.Ct., at 2806-2807 (Burger, C. J., dissenting); id., at 452-454, 92 S.Ct., at 2835-2836 (Powell, J., dissenting); Powell v. Texas, 392 U.S., at 531, 535-536, 88 S.Ct., at 2153-2155-2156 (plurality opinion). Indeed, "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death. [footnotes omitted].

Gregg v. Georgia (1976), 428 U.S. 153 at 183-4, 96 S. Ct. 2909 at 2929-30.

A jury can not fully speak for the public nor serve as a "significant and reliable objective index of contemporary values" as contemplated by this Court in Gregg v. Georgia, supra at 182, 2929 when

it is not aware of the harm caused by a murderer. Nor can a jury properly arrive at the punishment a murderer deserves without such consideration.

> This Court has previously recognized that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." Pennsylvania ex rel Sullivan v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 61 82 L.Ed. 43 (1937). Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. See Williams v. New York, 337 U.S., at 247-249, 69 S. Ct., at 1083-1084; Furman v. Georgia, 408 U.S., at 402-403, 92 S.Ct., at 2810-2811 (Burger, C. J., dissenting). While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth

> Amendment, see Trop v. Dulles, 356 U.S., at 100, 78 S.Ct., at 597 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Woodson v. North Carolina, supra at 304, 2991.

The "circumstances of the particular offense" requires the jury to know what the murderer has done to the victim's family and/or acquaintances. It would be a rare murder that does not have victim impact. To hold an offender responsible for this type of "knowledge" is not repugnant to our system of justice. Consideration of victim impact by a jury is a constitutionally indispensable part of the process of inflicting the death penalty because the Constitution requires the circumstances of the particular

offense to be considered. It is a narrow construction that prohibits consideration of victim impact evidence as a circumstance of the particular offense.

The same fundamental respect for humanity that is the heart of the Eighth Amendment applies to the victim and his loved ones, just as it does to the offender.

IX

CONCLUSION

The Petitioner requests this Court to rule that the Ohio Supreme Court misinterpreted this Court's rulings in Booth v. Maryland (1987), 482 U.S. 496, 107 S. Ct. 2529 and South Carolina v. Gathers (1989), 490 U.S. _____, 109 S. Ct. 2207.

The Petitioner further requests this Court to remand this case back to the Ohio Supreme Court with an order reinstating the death penalty because the Respondent's rights, as guaranteed him by the United States Constitution and its Amendments, were not violated.

The Petitioner requests this Court to hold that the Eighth Amendment does not prohibit the introduction of victim impact evidence adduced in the trial of this case because it was relevant to the

circumstances of the crime and was within the bounds of rebuttal, as defined by the evidence adduced by the Respondent during the Penalty Phase.

If this Court does not see fit to reinstate the death penalty in this case, the Petitioner requests this Court to hold that the victim impact evidence adduced in this trial was not constitutionally prohibited, and to remand for proceedings consistent with that holding.

The Petitioner respectfully urges this Court to reconsider and reverse Booth v. Maryland, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jonathan E. Rosenbaum, hereby certify pursuant to U.S. Sup. Ct. R. 28.3 that three copies of the foregoing Brief on the Merits were sent to Joan Bour-Stokes, Ohio Public Defender's Office, 8 East Long Street, 11th Floor, Columbus, Ohio, 43266-0587. on this 14th day of November, 1990 by depositing the three copies in a United States mail box with first class postage affixed thereto.

JONATHAN E. ROSENBAUM
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RESPONDENT'S

BRIEF

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether This Court May Reverse The Holding Of The Ohio Supreme Court That "Expressions Of Opinion By A Witness As To The Appropriateness Of A Particular Sentence In A Criminal Case Violate The Defendant's Constitutional Right To Have The Sentencing Decision Made By The Jury And Judge", Where That Court Relied On Long-Established State Law Principles, But Also Referred To *Booth v. Maryland* And *South Carolina v. Gathers* In Its Analysis?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1944

OHIO,

Petitioner,

v.

EDIBERTO HUERTAS,

Respondent.

On Writ of Certiorari to the Ohio Supreme Court

BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following Amendments to the United States Constitution:

A) The Eighth Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

B) The Fourteenth Amendment, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person

> of life, liberty or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes implicated by this case are as follows:

Ohio Revised Code Ann. § 2903.01 (Page's 1987)
Ohio Revised Code Ann. § 2929.02 (Page's 1987)
Ohio Revised Code Ann. § 2929.03 (Page's 1987)
Ohio Revised Code Ann. § 2929.04 (Page's 1987)
Ohio Revised Code Ann. § 2943.041 (Page's 1989)
Ohio Revised Code Ann. § 2945.07 (Page's 1989)
Ohio Revised Code Ann. § 2947.051 (Page's 1987)

The statutes are reprinted in the appendix.

STATEMENT OF THE CASE

A. Introduction

Respondent killed Ralph Harris, Jr., after a quarrel provoked by Harris's entering into a relationship with Respondent's paramour. At the sentencing phase of Respondent's capital trial, the state introduced evidence of Harris's family's reactions to Harris's death. This evidence came from three sources.

The first source was a presentence investigation report compiled by the Lorain County Ohio Adult Parole Authority. (J.A. 151.) The report contained a statement from Harris's parents. The second source of evidence was the testimony of Elizabeth Harris, the mother of the victim. (J.A. 126.) The third was the testimony of the victim's father, Ralph Harris, Sr., who told the jury that in his own opinion the Respondent should be sentenced to death. (J.A. 145-146.)

Although referring to all of this evidence in its description of the case, the Ohio Supreme Court ultimately vacated the death sentence imposed by Respondent's jury on the sole ground that it was error to admit Ralph Harris Sr.'s opinion testimony. *State v. Huertas*, 51 Ohio St. 3d 22, 553 N.E. 2d 1064 (1990). The Court explained the basis for its decision:

> We therefore hold that expressions of opinion by a witness as to the appropriateness of a particular sentence in a capital case violate the defendant's constitutional right to have the sentencing decision made by the jury and judge.
>
> After reviewing the arguments presented, we find no grounds on which to distinguish *Booth* and *Gathers*, and we are thus compelled to follow those cases, vacate the sentence of death, and remand for imposition of a life sentence in accord with *Penix*, *supra*.

Id. 51 Ohio St. 3d at 27, 553 N.E. 2d at 1065.

B. Summary of Evidence

Ralph Harris, Jr., the oldest son of Elizabeth Harris and Ralph Harris, Sr., (J.A. 2, 145.) was killed while he was in Lorain, Ohio, on military leave. (J.A. 3.) Prior to his death and while on leave in Lorain, Ralph Harris, Jr., had a relationship with Elba Ortiz. (J.A. 4.)

Respondent Huertas was closely acquainted with both Ralph Harris, Jr. and Elba Ortiz. He and Ralph Harris, Jr., had been friends since high school. (J.A. 18-19.) Respondent had a long time relationship with Elba Ortiz that produced two children. (J.A. 22.) The relationship between Ralph Harris, Jr. and Elba Ortiz caused great distress to Respondent Huertas. (J.A. 8-9.)

On the evening of Ralph Harris, Jr.'s death, June 6, 1987, Respondent Huertas and his roommate Daniel Lopez drank beer and rum in quantity at several bars; and at their apartment (R. 755, 758-760, 764-766);[1] smoked six

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[1] References to the proceedings that are not contained in the joint appendix are designated R. and P.R. R refers to portions of the trial phase. P.R. refers to portions of the sentencing phase.

or seven marijuana cigarettes (R. 755, 766, 813); and inhaled cocaine (R. 764, 768).

Respondent Huertas then called Elba Ortiz. (R. 821.) At that time, Ortiz informed Huertas that Ralph Harris, Jr., was with her and they would be spending the night together. (R. 821.) Respondent became angry and ended the conversation. (R. 663.)

Later that evening, Elba Ortiz and Ralph Harris heard something at Ms. Ortiz's apartment door. (R. 664.) While investigating, Ralph Harris was stabbed one time. (R. 665.) Mr. Harris died several hours later from the knife wound.

During the State's case-in-chief at the trial phase, the victim's mother, Elizabeth Harris, testified to various matters. The State adduced testimony from Mrs. Harris in an attempt to prove that Respondent committed the murder of Ralph Harris, Jr., with prior calculation and design. Specifically, Mrs. Harris testified regarding an argument between Ediberto Huertas and Ralph Harris, Jr., that occurred approximately one week prior to Harris's death. (J.A. 5-12.) Mrs. Harris testified that Ediberto Huertas and Ralph Harris, Jr., were "dear friends" (J.A. 2); that Huertas had come to her home twice on the day he and Ralph Harris, Jr., argued (J.A. 5); that the argument stemmed from the fact that both men were romantically involved with Elba Ortiz (J.A. 8, 16); and that in the course of the argument, Ediberto Huertas threatened to harm Ralph Harris, Jr. (J.A. 9, 12).

At the conclusion of the trial phase, the jury found Respondent guilty. (R. 940-942.) The trial court then granted the motion of Respondent's counsel for a presentence investigation pursuant to Ohio Rev. Code Ann. § 2929.03(D)(3) (Page's 1987). (R. 942, 944.)

At the outset of the sentencing hearing, the trial court granted the State's motion to incorporate into the sencing phase all the evidence adduced against Respondent

at his guilt trial. (P.R. 63.) The State then rested, while reserving the opportunity to call witnesses in rebuttal of the defense case in mitigation. (P.R. 63.) The trial court specifically instructed the jury that the jurors were permitted, in their sentencing deliberations, to recall any evidence presented at the trial phase to prove the aggravating circumstances charged against the Respondent. (P.R. 65.)

Respondent presented various witnesses in mitigation. Family members testified that Respondent and Ralph Harris, Jr., were close friends (J.A. 54, 63, 83, 164); that Respondent was a good father to his children by providing financial support and love to them (J.A. 55, 68, 119-121; P.R. 102-03); and that Respondent showed love to members of his family and that they loved and were proud of him. (J.A. 66-68, 89, 116; P.R. 164-165.)

Respondent's family also testified regarding problems in his childhood home environment (P.R. 99-100); the impact of his drug and alcohol abuse upon his marriage (P.R. 76-77); his remorse over the killing of Ralph Harris, Jr., (P.R. 127, 163-164); and Respondent's wish to be forgiven by the Harris family and by God. (P.R. 128, 144-145, 164.)

The prosecutor vigorously cross-examined the family members who testified on Huertas's behalf. The prosecutor attacked their testimony regarding Respondent's good qualities as a parent and financial provider by eliciting testimony that Respondent's wife and children subsisted on government welfare funds (P.R. 78, 83-84, 132); that Respondent infrequently spent time with his children (P.R. 83, 109, 132); that he engendered domestic troubles between himself and his wife due to his sexual promiscuity (P.R. 79, 83, 92); although Respondent did not have an adult criminal record, that he did have a juvenile criminal record and had engaged in brawling at both the workplace and in school. (P.R. 138.) The State also

elicited testimony to undermine Respondent's mitigating evidence that he was intoxicated on the night of his crime (P.R. 139-140), and attacked the claim that Respondent had accepted responsibility for his crime. (P.R. 141.)

Respondent made an unsworn statement to the jury at the sentencing phase of his trial in which he told of his friendship for the victim (J.A. 91); expressed his remorse for the killing (J.A. 91); and asked for forgiveness. (J.A. 91-92.) Respondent also apologized to Ralph Harris, Jr., Mrs. Elizabeth Harris, and Ralph Harris, Jr.'s son. (J.A. 94.)

Upon the conclusion of Respondent's unsworn statement, the defense rested its case in mitigation. (P.R. 239.) The State then offered the presentence investigation into evidence. Respondent's counsel objected to the admission into evidence of the presentence investigation report. (J.A. 96.) Respondent's counsel also requested that the trial court excise any information from the report that was "outside the rules of admissibility as far as evidence is concerned" and that the court admit only "those sections of the report that are, in fact, admissible." (J.A. 96-97.) The trial court overruled this objection and allowed the report to go to the jury. (J.A. 99.) The trial court concluded that the victim impact statement was required to be contained in the presentence investigation report and that it was mandatory that the report be submitted to the jury. (J.A. 102.) The trial court further concluded that the inclusion of the Harris family's statements in the victim impact portion of the report was necessary because "the victim's family cannot give a statement." (J.A. 103.)

The State of Ohio then called its witnesses in the sentencing phase. The State adduced testimony from Ralph Harris, Jr.'s mother, Elizabeth Harris (J.A. 127), over defense objection. (J.A. 129.) Her testimony repeated much of what she had previously testified to and was filled with emotional pleas to Jesus. (J.A. 131, 132.)

Mrs. Harris also testified to her son's good character and how his death had affected her grandson. (J.A. 135.)

In particular, Mrs. Harris testified that she was Ralph Harris, Jr.'s mother and that his son, Ralph Harris, III, was her grandson. (J.A. 128.) She recounted her testimony, previously given at the guilt phase of Respondent's trial, regarding the confrontation at her home between Respondent Huertas and her son regarding Elba Ortiz. (J.A. 129.) The State then inquired if Mrs. Harris was proud of Ralph Harris, Jr. (J.A. 133.) In response, Mrs. Harris testified, "Oh God, how proud I was, a child that never give me no problem, no nothing, no drinking, no smoking, nothing but go to Church and come back and do his Army, work out for Karate." (J.A. 133.) The State also asked Mrs. Harris if Ralph Harris, III, missed his father. (J.A. 133.) Mrs. Harris described the child's response to his father's death by testifying, "Oh, God, yes. I hate to take him to the graveyard. He always wants to go. He think he is going to see his dad. Oh, dear God, please help us, help us Lord, Jesus." (J.A. 133.)

After the State concluded direct examination she again called out to Jesus and was asked by the trial judge if she was in need of a glass of water to which she replied, "Oh, what a good kid. Oh, Jesus, help me. Please help me." (J.A. 133, 134.)

During cross-examination, Respondent's counsel elicited testimony from Mrs. Harris regarding her knowledge of the distress felt by Respondent's family because of his crime (J.A. 135); the close friendship between Respondent Huertas and her son (J.A. 136); that Elba Ortiz had deceived Mrs. Harris regarding the status of Elba's relationship with Respondent Huertas (J.A. 136-137, 139); the verbal altercation between Ralph Harris, Jr., and Respondent Huertas (J.A. 138); and Mrs. Harris's relationship with Ralph Harris, III. (J.A. 140.)

Respondent's counsel then inquired whether Mrs. Harris had indicated to the prosecutor, and the Lorain County probation officer who prepared Respondent's presentence investigation, that Respondent should not receive the death penalty. (J.A. 141.) Mrs. Harris responded, "I told Mr. Rosenbaum that I am not the Judge and I'm not the Jury; and it's up to the Courts." (J.A. 141.) Mrs. Harris also testified that whether or not Respondent received the death penalty would be a matter for God to decide. (J.A. 141.)

On redirect examination, Mrs. Harris testified that the pain felt by Respondent's family over the crime was not equal to hers "because they still have Eddie; and I don't have Ralph." (J.A. 143.)

The State then called Ralph Harris, Sr., to testify. Mr. Harris was asked by the prosecutor if he had an opinion as to whether Respondent should receive the death penalty. (J.A. 145.) Over objection, Mr. Harris testified, regarding the Respondent, "He—took a life. Yes, I do."

On cross-examination, Mr. Harris again testified that Respondent should receive the death penalty. (J.A. 146.) Respondent's counsel also inquired if Mr. Harris understood that the jury, not Mr. Harris, would make the decision as to Respondent's sentence (J.A. 147), to which Mr. Harris responded affirmatively. (J.A. 147.)

The State then presented closing argument. The State's argument included reference to Ralph Harris, Jr., and the Harris family. The State argued that Ralph Harris, Jr., and the Harris family, including five year old Ralph Harris, III, had paid the "ultimate price" for the Respondent's "misconduct." (P.R. 294.)

Following closing argument, the trial court instructed the jury to consider all the evidence presented at both trials, including the presentence investigation report. (P.R. 315.)

On February 24, 1987, the jury, after deliberating for six hours and fifteen minutes, returned a verdict sentencing the Respondent to death. (P.R. 324-327.)

The trial court accepted the jury's recommendation and on March 10, 1987, sentenced Respondent Huertas to death. (P.R. 332-333.) The trial court, in accepting the jury's death verdict, specially noted that it relied on the statements of Mrs. Harris, the victim's mother. (P.R. 332.)

SUMMARY OF ARGUMENT

Resolution of this case does not require revisiting *Booth v. Maryland*, 482 U.S. 496 (1987), or *South Carolina v. Gathers*, —— U.S. ——, 109 S. Ct. 2207 (1989). Rather, this case, as decided by the Ohio Supreme Court, rests on a much narrower footing. It involves only the propriety of allowing the victim's father to testify that Respondent should receive the death penalty.

The Ohio Supreme Court vacated Respondent's death sentence based on the opinion testimony of Mr. Harris, the victim's father. The court held that "[e]xpressions of opinion by a witness as to the appropriateness of a particular sentence in a capital case violate the defendant's constitutional right to have the sentencing decision made by the jury and judge." *State v. Huertas*, 51 Ohio St. 3d 22, syl., 553 N.E.2d 1058, 1060 syl. (1990). This holding, lodged in the syllabus, constitutes the only law of the case. *Williamson v. Radich*, 128 Ohio St. 124, 126, 190 N.E. 403, 404 (1934); *Ohio v. Gallagher*, 425 U.S. 257, 259 (1976).

This narrow decision by the Ohio Supreme court does not implicate the debate that divided this Court in *Booth v. Maryland* or the issues briefed by the Petitioner. It simply involves a state court decision, resting heavily on state law underpinnings, that lay opinion testimony on the appropriate punishment in a capital case is improper. Any decision by this Court under *Booth v. Maryland* or

South Carolina v. Gathers will not affect the ultimate decision rendered by the Ohio Supreme Court. For this reason, the *Booth/Gathers* issues briefed by Petitioner are not presented with the immediacy or concreteness required to support constitutional adjudication, and certiorari should be dismissed as improvidently granted.

If this Court does reach the merits of the case, the only issue that it needs to decide is the one decided by the Ohio Supreme Court below: the admissibility of the opinion testimony of the victim's father. Even as a matter of constitutional law, this is not a difficult issue. Accepting, as this Court should accept, the Ohio Supreme Court's state-law determination that the father's testimony had no legitimate place in the penalty trial—that it was utterly irrelevant to the issues for consideration at the sentencing stage—there is simply no state interest in allowing the testimony. We are thus left with evidence whose emotional character entails a significant risk of triggering a death sentence "'based on . . . caprice or emotion.'" *Zant v. Stephens*, 462 U.S. 862, 885 (1983), quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977), and *no* justification for its admission. Such evidence cannot be used to obtain a death sentence consistently with the Eighth Amendment's concern for reliability in capital sentencing. *E.g., Beck v. Alabama*, 447 U.S. 625 (1980).

Although not necessary to a resolution of this case, the Ohio Supreme Court also correctly decided that the emotion-laden testimony of the victim's mother was improper. A capital defendant's acquaintance with a victim's family and his concomitant ability to anticipate their grief and emotional trauma has no bearing on the question of the admissibility of victim impact evidence at a capital sentencing trial. This principle is underscored by this Court's decision in *Booth v. Maryland*, 482 U.S. 496 (1987). In *Booth* the murderer knew his victims. This knowledge did not prevent this Court from deciding

that the Eighth Amendment prohibits the introduction of victim impact evidence at a capital sentencing hearing.

If knowledge of the existence of the victim's family sufficed to render victim impact evidence admissible, imprecision in the standards guiding the jury's interpretation of that evidence would result. This type of inquiry would distract the jury "from its constitutionally required task" of evaluating the specific "accused and the particular circumstances of the crime" to determine whether death is the appropriate punishment. *Booth v. Maryland*, 482 U.S. at 496. Any relevance attached to the knowledge a defendant has of the existence of the victim's family is outweighed by the risk that the victim impact evidence will cause the sentencing decision to be made arbitrarily. *Id.* at 505.

The Ohio Supreme Court and the Ohio legislature have long recognized the inadmissibility of victim impact evidence and victim character evidence. Ohio Rev. Code Ann. §§ 2943.041 and 2945.07 (Page's 1989); *State v. White*, 15 Ohio St. 2d 146, 239 N.E.2d 65 syl. 2 (1968). Consequently, the admission of victim impact evidence in capital cases offends Ohio law, as well as the Eighth Amendment requirement for a constitutionally-imposed death sentence. Admission of the emotion-laden testimony of the victim's mother in this case violated the decisions of this Court in *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, —— U.S. ——, 109 S. Ct. 2207 (1989).

ARGUMENT

I. THE OPINION BELOW IS BASED ON STATE LAW AND MAKES THIS CASE INAPPROPRIATE FOR ADJUDICATING ISSUES UNDER *BOOTH v. MARYLAND*, 482 U.S. 496 (1987)

The dissenting opinions in *Booth v. Maryland*, 482 U.S. 496 (1987), and changes in the composition of this Court since *Booth* was decided make it plain that a majority of the present Court would not have voted with the majority in *Booth*.[2] Emboldened by this observation, the dissenting justices below invited the State of Ohio to make this case the vehicle through which a retrenchment or overruling of *Booth* could be obtained. Petitioner has sought to do just that. *Amici* disaffected with *Booth* have joined the crusade.

If this Court were a legislature, the very earnestness of these attacks on *Booth* might well warrant its reconsideration. But the Court is an Article III court, and the exercise of its function of constitutional adjudication is bounded by principles far more important to a federal system than the substantive ruling in any single case. The most basic of those principles is that the Court does not decide constitutional questions unnecessarily. It has been the Court's consistent rule "never to anticipate a question of constitutional law in advance of the necessity of deciding it . . . [and] never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). *See, e.g., Jean v. Nelson*, 472 U.S. 846 (1985), ("[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to

[2] In *South Carolina v. Gathers*, —— U.S. ——, 109 S. Ct. 2207, 2211 (1989), Justice Kennedy joined in Justice O'Connor's dissenting opinion critical of *Booth*. In *Booth* itself, the Chief Justice and Justices White, O'Connor and Scalia dissented. 482 U.S. at 515, 519.

pass on questions of constitutionality . . . unless such adjudication is unavoidable"); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 488 (1972) ("[t]his Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form'"); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 445-46 (1988); *West v. Atkins*, 487 U.S. 42, 49 n.8 (1988).

As this section will demonstrate, the decision below simply does not implicate the debate that divided the Court in *Booth* or the issues broadly briefed by the Petitioner and its *amici*. The case was decided by a majority of the Ohio Supreme Court on a much narrower ground, and its decision leaves no doubt that its judgment would be the same whether *Booth's* general proscription of victim-impact evidence in capital sentencing proceedings was reaffirmed, narrowed, or overruled. All that the Ohio Supreme Court held here was that a specific piece of "victim" evidence which has no legitimate role to play in Ohio's capital sentencing procedure—the opinion testimony of the murder victim's father that the defendant should be given a death sentence—is inadmissible. The *Booth* debate is not about that, but about the very different question whether factual information regarding consequences of a murder that were not contemplated by the murderer can appropriately be considered as relevant to the murderer's personal culpability for purposes of capital sentencing.

No justice of this Court in *Booth* or since *Booth* has suggested—however the *Booth* issue is resolved—that the family member of a murder victim should be permitted to take the witness stand and tell the jury that, in his or her opinion, the defendant should get the death sentence. To discuss the admissibility of such opinion testimony in constitutional terms would be to render a purely advisory

opinion, since the state-law rules of evidence in Ohio and everywhere else forbid "attempts . . . to introduce meaningless assertions which amount to little more than [a lay witness] choosing up sides . . . ." Advisory Committee's Notes on Federal Rule of Evidence 701; see, *e.g.*, McCormick, Evidence 38 [3d ed. [Cleary]] (1984):

> "Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided . . . It is believed that all courts would exclude such extreme expressions. There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for the decision to the witness; and in any event it is wholly without value to the trier of fact in reaching a decision."

Accord, 3 Weinstein & Berger, Evidence 701-25 - 701-26 (1988); 7 Wigmore, Evidence 11 (Chadbourn rev. 1973). To seize upon a case involving evidence of this sort for the purpose of asking the Court to reconsider *Booth v. Maryland*—a case involving real issues that are far more difficult and complicated—is a classic invitation to announce constitutional law in the abstract, without a "clean-cut and concrete" controversy that requires constitutional decision. *Socialist Labor Party v. Gilligan*, 406 U.S. at 588.

An examination of the Ohio Supreme Court's precise holding in this case makes the point quite clear. In Ohio "the syllabus of a decision of the Supreme Court of Ohio states the law of Ohio." *Williamson v. Radich*, 128 Ohio St. 124, 126, 190 N.E. 403, 404 (1934). "Only that which is stated in a syllabus or in a *per curiam* opinion represents a pronouncement of the law of Ohio." *Masheter v. Kebe*, 49 Ohio St. 2d 148, 150, 359 N.E.2d 74, 76 (1976); *Ohio v. Gallagher*, 425 U.S. 257, 259 (1976). The syllabus in the present case reads as follows:

> Expressions of opinions by a witness as to the appropriateness of a particular sentence in a capital case violate the defendant's constitutional right to have the sentencing decision made by the jury and judge.

State v. Huertas, 51 Ohio St. 3d at 22, 553 N.E.2d at 1058, syl.

The syllabus issued by the Ohio Supreme Court only concerned the testimony given by Mr. Harris. The "law" the Court issued did not rest primarily on the principles espoused by the decision in *Booth v. Maryland*. Rather, it rested on Mr. Huertas's right to have the appropriate punishment determined by the jury. The Ohio Supreme Court specifically recognized that Mr. Harris's testimony went beyond that considered in *Booth* and *Gathers*. Id. at 26, 553 N.E.2d at 1064.

The Ohio Supreme Court opinion states explicitly that Mr. Harris's testimony constituted improper lay opinion testimony. Such "opinions go to the ultimate issue, usurp the jury's function and undermine the defendant's right to trial by an impartial court." *Id.* at 27, 553 N.E.2d at 1065. This type of analysis involves an interpretation of Ohio evidentiary law. Ohio courts have consistently disallowed, under Ohio Rules of Evidence 701 and 704, lay opinion testimony on the ultimate issue absent an indication that it is helpful to the trier of fact. *Shepherd v. Midland Mutual Life Ins. Co.*, 152 Ohio St. 6, 87 N.E.2d 156 (1949); *Tomison v. Cincinnati*, 4 Ohio St. 3d 66, 446 N.E.2d 454 (1983). No enunciated doctrine prevents a state from construing and applying its own principles and rules of evidence. *Lisenba v. California*, 314 U.S. 219, 227 (1941).

Any decision by this Court under *Booth* and *Gathers* would not affect the inadmissibility of Mr. Harris's testimony under Ohio law.[3] It would not affect the judgment

[3] Nor would it affect the testimony of Mrs. Harris. Under Ohio law, victim impact testimony is prohibited by case law and statute. The Ohio Supreme Court has prohibited victim impact testimony in

of the Ohio Supreme Court below. This Court should therefore decline the invitation to construe or overrule *Booth* and *Gathers*. In light of Petitioner's briefing of the issues supposedly presented—but which are neither necessary to decision here nor controlling of the outcome of this case—the Court should dismiss certiorari as improvidently granted.

II. THE EIGHTH AMENDMENT PROHIBITION AGAINST PROCEDURES WHICH INVITE ARBITRARY AND EMOTIONAL CAPITAL SENTENCING REQUIRES AFFIRMANCE OF THE DECISION BELOW

In any event, if this Court reaches the merits, the only issue which it must decide is whether the Ohio Supreme Court incorrectly held that the Eighth Amendment as well as Ohio law forbade the opinion testimony of Ralph Harris, Sr. The Ohio court rested its decision vacating Petitioner's death sentence, solely on the erroneous admission of this testimony.

The narrow constitutional question presented is an easy one. It implicates a principle that this Court has recognized repeatedly in a wide variety of contexts: that "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, —— U.S. ——, 109 S. Ct. 1981, 1986 (1988). A familiar corollary of these principles—which every Justice who has spoken on the issue has recognized—is that the

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capital cases at least since its 1968 decision in *State v. White*, 15 Ohio St. 2d 146, 239 N.E.2d 65 syl. 2 (1968). Ohio's capital statutory scheme also precludes the introduction of victim impact evidence in capital cases. Ohio Revised Code Ann. § 2943.041, 2945.07 (Page's 1989); *State v. Post*, 32 Ohio St. 3d 380, 383-84, 513 N.E.2d 754, 758-759 (1987), *cert. denied*, 484 U.S. 1079 (1988).

Eighth Amendment requires capital sentencing procedures to be safeguarded against a substantial risk of death sentences brought about by emotional influences that make them arbitrary and capricious. *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion of Justice Stevens) ("[i]t is of vital importance to the defendant and to the community that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion"); *id.* at 363 (concurring opinion of Justice White); *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (Court's opinion by Justice Stevens) ("[t]o insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination"); *California v. Brown*, 479 U.S. 538, 543 (1987) (Chief Justice Rehnquist for the Court) ("[a]n instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial . . . serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors . . . [a]nd to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case'"); *Penry v. Lynaugh*, —— U.S. —— 109 S. Ct. 2934, 2951 (1989) (Court's opinion by Justice O'Connor) ("[r]ather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned *moral* response to the defendant's background, character, and crime'"); *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (Court's opinion by Justice White) ("[a]s for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability—what Enmund's intentions, ex-

pectations, and actions were [because] American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability' "); *Eddings v. Oklahoma*, 455 U.S. 104, 117-118 (1982) (concurring opinion of Justice O'Connor) ("[b]ecause sentences of death are 'qualitatively different' from prison sentences, . . . this court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake"); *Walton v. Arizona*, —— U.S. ——, 110 S. Ct. 3047, 3063 (1990) (concurring opinion of Justice Scalia) (the requirement "that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not 'deserve to be sentenced to death' . . . [is unacceptable because it] quite obviously destroys whatever rationality and predictability the . . . [rule of *Furman v. Georgia*, 408 U.S. 238 (1972)] was designed to achieve"); *cf. Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (opinion of Justices Stewart, Powell and Stevens) ("[b]ecause of the uniqueness of the death penalty, *Furman* held that it could not be imposed under procedures that created a substantial risk that it would be imposed in an arbitrary and capricious manner").

Here, there is no need—as there was, for example, in *Booth v. Maryland*—to reconcile this fundamental Eighth Amendment concern with a state's asserted interest in presenting to the sentencing jury a particular kind of evidence that state law deems relevant to capital sentencing despite its potentially inflammatory emotional impact. For in this case, the Ohio Supreme Court, the ultimate expositor of Ohio law, has unambiguously declared that the kind of testimony given by Ralph Harris, Sr., has *no* relevance and *no* proper function in Ohio's capital sentencing scheme. Under the law of Ohio, testimony by a member of a murder victim's family that he or she believes that the defendant should be sentenced to death merely "usurp[s] the jury's function." *State v. Huertas*, 51 Ohio St. 3d at 87, 553 N.E.2d at 1065.

In sum, the introduction of emotion-laden evidence was irrelevant to the issues framed by state law for the salutary and constitutionally indispensable purpose of guiding the jury's decision-making process in this capital case. The sentencing phase proceeding was further imbalanced by the interjection of opinion evidence that implicated absolutely *no* legitimate state interest whatever. If capital sentencing is required to be rational at all, the Ohio Supreme Court was correct in excluding such evidence.

1.

The record reflects no remotely arguable justification for the opinion evidence of Ralph Harris, Sr., within the framework of the Ohio capital sentencing procedure. Both as it appeared in the presentence investigation report and as Mr. Harris gave it orally from the witness stand, it conveyed no informational content except his personal conclusion that his son's murderer should get the death sentence.

The presentence investigation report prepared following Respondent Huertas's conviction included a victim impact statement. (State's Ex. 1; J.A. 95, 102.) The victim impact statement detailed an interview with the victim's parents, Ralph and Elizabeth Harris. (J.A. 161-63.) Mrs. Harris described certain personal characteristics of her son. She then "explained that she is very religious, feels that God has the only right to punish the defendant, and the Court should do what it has to do." (J.A. 161-62.) By contrast the victim's "father stated that since his son's life was taken, that the defendant deserves to get the death penalty." (J.A. 162.)

The State of Ohio offered the presentence investigation report into evidence after the defense presented its case

in mitigation.[4] Defense counsel objected to the introduction of the presentence investigation report. (J.A. 96.) Defense counsel also requested that any information in the report that was "outside the rules of admissibility as far as evidence is concerned would be excluded from the report; and that the Court only admit those sections of the report that are, in fact, admissible." (J.A. 96-97.) The trial court overruled this objection and allowed the report to go to the jury. (J.A. 99.) In making this decision, the trial court concluded that the victim's statement was a required part of the presentence investigation report, and that it was mandatory that the report be submitted to the jury. (J.A. 102.)[5]

The State of Ohio also called Mr. and Mrs. Harris to testify at the penalty phase (J.A. 127, 145). On direct examination, over defense objection (J.A. 129), Mrs. Harris in effect repeated the substance of her testimony at the guilt phase. (J.A. 127-34.) On cross-examination, Mrs. Harris was asked by defense counsel whether Edi-

[4] In Ohio, the defendant has the burden of production at the penalty phase and must go forward with any evidence in mitigation. The prosecution still bears the burden of persuasion beyond a reasonable doubt that the aggravating circumstances proven at the guilt phase outweigh the mitigating factors. Ohio Revised Code Ann. § 2929.03(D)(1) (Page's 1987).

[5] The trial court's ruling involves a misapplication of two key points of Ohio law. First, Ohio law prohibits victim impact statements from being admitted in a capital case. Ohio Rev. Code Ann. §§ 2947.051, 2943.041, 2945.07. See *State v. Post*, 32 Ohio St. 3d 380, 513 N.E.2d 754 (1987), *cert. denied*, 484 U.S. 1079 (1988). Second, Ohio law does require the mandatory submission of the PSI once it is requested pursuant to Ohio Revised Code Ann. § 2929.03(D)(1). However, the Ohio Supreme Court has held that trial courts have discretion to delete matters which "have a potential to mislead the jury." *State v. Green*, 29 Ohio St. 3d 226, 506 N.E.2d 382, syl. 1 (1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1766 (1989). Thus, the trial court had the authority and obligation under Ohio law to redact the victim impact section of the report.

berto Huertas should receive the death penalty. (J.A. 141.) Mrs. Harris responded that that decision should be left to the courts and God. (J.A. 141.)

The State of Ohio then called Mr. Harris to the witness stand. (J.A. 145.) Mr. Harris's testimony was confined to one issue: he believed Respondent should receive the death penalty, and he flatly stated this opinion to the jury. (J.A. 146.)

Mr. Harris's opinion that Respondent Huertas should be sentenced to death goes beyond the victim impact evidence considered by this Court in *Booth v. Maryland*, 482 U.S. 496 (1987). In *Booth*, the Court noted that the victim impact statement contained statements by the victim's family falling into two separate categories. *Id.* at 502. Mr. Harris's testimony in the present case most closely resembles the second category in *Booth*: "the family members' opinions and characterizations of the crimes and the defendant." *Id.*

The content of Mr. Harris's testimony, however, does not correspond to the statements in *Booth* that fit this category. No member of the Bronstein family in *Booth* went so far as to say that Booth should receive the death penalty. The Bronsteins's son stated "that his parents were not killed, but were butchered like animals. He [did not] think anyone should be able to do something like that and get away with it." *Id.* at 512 (Appendix to opinion of the Court). Similarly, the Bronsteins' daughter did not feel the murderers could ever be "rehabilitated and she [did not] want them to be able to do this again or put another family through this." *Id.* The Bronstein family simply wanted to see "swift and just punishment." *Id.* at 514.

The comments by the Bronstein family concerning the appropriate punishment for Booth were temperate compared to Mr. Harris's. Yet these statements prompted the dissenters in *Booth* to observe that "[t]o the extent

that the court determined that in this case it was *inappropriate to allow the victims' family to express their opinions*, on, for example, *whether Petitioner could be rehabilitated*, that is obviously not an inherent fault in all victim impact statements and no reason to declare the practice of admitting such statements at capital sentencing hearings *per se* unconstitutional." *Id.* at 518. (Emphasis added.)

2.

The Ohio Supreme Court vacated Respondent Huertas's death sentence because Mr. Harris's opinion testimony was improperly admitted into evidence. The Court held "that expressions of opinion by a witness as to the appropriateness of a particular sentence in a capital case violate the defendant's constitutional right to have the sentencing decision made by the jury and judge." *State v. Huertas*, 51 Ohio St. 3d at 27, 553 N.E.2d at 1065. The Court reasoned that:

> Statements by a member of the victim's family recommending a particular punishment, such as Mr. Harris's penalty phase testimony, have nothing to do with culpability or moral guilt. They are simply opinions on the appropriate sentence given by someone who, though having a great personal interest in the outcome, is not a member of the jury. These opinions go to the ultimate issue, usurp the jury's function and undermine the defendant's right to trial by an impartial court.

Id.

3.

Other jurisdictions are in accord with the Ohio Supreme Court in holding that opinion testimony on the appropriate punishment is erroneous. See *Patterson v. State*, 513 So. 2d 1257, 1263 (Fla. 1987); *State v. Gardner*, 789 P.2d 273, 286 (Utah 1989); *Mackall v. Commonwealth*, 372 S.E.2d 759, 768 (Va. 1988), *cert. denied*, —— U.S. ——, 109 S. Ct. 3261 (1988); *Coleman v. State*, 558 N.E.2d 1059, 1062 (Ind. 1990); *State v. Rushing*, 464 So. 2d 268, 276 (La. 1985), *cert. denied*, 476 U.S. 1153 (1986).

In *Robison v. Maynard*, 829 F.2d 1501, 1505 (10th Cir. 1987), the Tenth Circuit Court of Appeals advanced two reasons why such opinions on the appropriate sentence to be imposed in a capital case are inadmissible. The court first explained that "[a]n individual's personal opinion of how the sentencing jury should acquit its responsibilities, even though supported by reasons, relates to neither the character or record of the defendant nor to the circumstances of the offense." *Id.* at 1505. The Court then noted that "allowing any person to opine whether the death penalty should be invoked would interfere with the jury's performance of its duty to exercise the conscience of the community . . . . [O]nly the community, speaking through the jury, has the right to determine what punishment should be administered." *Id.*

Allowing the victim's family to express its opinion that the defendant should be sentenced to death is inconsistent with the role reserved for the jury in a capital case. "The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant." *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987). "[I]t is the jury's function to make the difficult and uniquely human judgments that defy codification and buil[d] discretion, equity, and flexibility into a legal system," *id.* at 311, (quoting H. Kalven and Zeisel, The American Jury 498 (1966)).

To achieve the purposes of a capital sentencing hearing, it is crucial that the weighing process required in every case rest exclusively with the jury and not a lay witness. In a capital case, the legislature has "provide[d] the jury with some framework for discharging [its] responsibilities." *Franklin v. Lynaugh*, 487 U.S. 164, 108 S. Ct. 2320, 2330 (1988) (plurality). Moreover, "[j]uries are

invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit." *Gregg v. Georgia*, 428 U.S. at 192. A lay witness is bound by no such objective principles. Accordingly, any death sentence imposed at the urging of such a witness is arbitrary and capricious. "The danger here is that the jury could easily accord too much weight to the pronouncement of a lay witness unfamiliar with the standards erected by the criminal law, whose statement may be charged with . . . emotionalism . . ." *United States v. Ness*, 665 F.2d 248, 250 (8th Cir. 1981).

It is simply inappropriate to allow any witness to tell the jury the decision it should reach in a capital case. Ohio law has consistently disallowed, under Ohio Rules of Evidence 701 and 704, lay opinion testimony on the ultimate issue unless it is helpful to the trier of fact. *Shepherd v. Midland Mutual Life Ins. Co.*, 152 Ohio St. 6, 87 N.E.2d 156 (1949); *Urban, ex rel. Newland v. Downing*, 43 Ohio St. 3d 109, 539 N.E.2d 140 (1989); *Tomison v. Cincinnati*, 4 Ohio St. 3d 66, 446 N.E.2d 454 (1983).[6] By its decision in *State v. Huertas*, 51 Ohio St. 3d at 22, 553 N.E. 2d at 1058, the Ohio Supreme Court concluded that Mr. Harris's testimony was not helpful to the trier of fact.

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[6] Similarly, while Federal Rule of Evidence 701 allows opinion testimony on the ultimate issue, the Advisory Committee's Note on Rule 701 makes clear that testimony is not permitted which simply tells the jury what result to reach. Fed. Evid. R. 704, Advisory Comm. Notes (1979). Courts have universally condemned opinion testimony merely stating a legal conclusion. *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983); *United States v. Ness*, 665 F.2d at 238; *Security Life Insurance Co. of Georgia v. Blitch*, 155 Ga. App. 167, 171, 270 S.E.2d 349, 354 (1980); *Hawkins v. Chandler*, 88 Idaho 20, 26, 396 P.2d 123, 126 (1964); *State v. Jiles*, 258 Iowa 1324, 1331, 142 N.W.2d 451, 455 (1966); *Jershin v. Becker*, 217 Neb. 645, 652, 351 N.W.2d 48, 53 (1984); *Hopkins v. State*, 480 S.W.2d 212, 218 (1972).

4.

The Petitioner asserts that Mr. Harris's testimony constituted proper rebuttal of Mrs. Harris's testimony because her testimony implied that she did not want Ediberto Huertas to receive the death penalty. Mrs. Harris, however, did not ask that Ediberto Huertas be sentenced to life. When asked if she wanted him to get the death penalty, she responded that the decision was up to God and the Court. (J.A. 141-42.) Mrs. Harris recognized that the sentence was not her decision to make, but the jury's. By contrast, Mr. Harris explicitly said that Ediberto Huertas should receive the death penalty. (J.A. 145-46.) This did not constitute rebuttal of Mrs. Harris's testimony.

Under Ohio law, the State's use of rebuttal at the penalty phase has been clearly defined. The prosecutor's role is limited to rebutting mitigating evidence offered by the defense and full cross-examination of the defense witnesses. *State v. DePew*, 38 Ohio St. 3d 275, 285-86, 528 N.E.2d 542, 554-555 (1988), *cert. denied*, —— U.S. ——, 109 S. Ct. 1099 (1988). Examination of the content of Mr. Harris's testimony reveals that it did not serve to rebut the mitigation offered by the defense. The Ohio Supreme Court held it did not constitute proper rebuttal. *State v. Huertas*, 51 Ohio St. 3d at 25-26, 553 N.E.2d at 1064. Ediberto Huertas's mitigation focused on his problems with drugs and alcohol, the love present in his family, and that he was a good father to his children. (J.A. 55, P.R. 87, 98, 102, 104, 120, 125, 165, 175-86.)[7] Thus, the Ohio Supreme Court held, as a mat-

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[7] Under Ohio law the elements of aggravated murder and the aggravating circumstances must be proved at the *guilt* phase. Ohio Revised Code, § 2929.03(D)(2) (Page's 1987). At the sentencing phase, the State of Ohio may only raise those aggravating circumstances proven at the guilt phase. *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), *cert. denied*, 472 U.S. 1032 (1985); *State v. Johnson*, 24 Ohio St. 3d 87, 494 N.E.2d 1061 (1986). Mrs. Harris's testimony also was not proper rebuttal to

ter of state law, that Mr. Harris's testimony "was not rebuttal testimony." *State of Huertas*, 51 Ohio St. 3d at 26, 553 N.E.2d at 106.

Petitioner urges this Court to set out standards for the scope of proper rebuttal in a capital case. But this is purely a matter of state law. The Court has reiterated that there is no "one right way for a State to set up its capital sentencing scheme." *Cabana v. Bullock*, 474 U.S. 376, 387 (1986), quoting *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). Ohio has defined the permissible role of prosecution introduced testimony at a capital sentencing hearing, *State v. DePew*, 38 Ohio St. 3d at 285-86, 528 N.E.2d at 554-555 (1988), *cert. denied*, —— U.S. ——, 109 S. Ct. 1099 (1988), and its rules on that subject should not be disturbed by this Court.

III. THE EIGHTH AMENDMENT PROHIBITION AGAINST THE USE OF VICTIM IMPACT TESTIMONY IN A CAPITAL SENTENCING HEARING APPLIES EVEN WHEN THE DEFENDANT IS ACQUAINTED WITH THE VICTIM AND THE VICTIM'S FAMILY

Although this issue need not be decided, the Ohio Supreme Court was also correct in excluding the testimony of Elizabeth Harris, the victim's mother. In *Booth v. Maryland*, 482 U.S. 496, 501-502 (1987), this Court concluded that the "Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence." The Court defined victim impact evidence as including the "personal characteristics of the victims and the emotional impact of the crimes on the family . . ." *Id.* at

any defense evidence at the penalty stage. Mrs. Harris's testimony went to the element of prior calculation and design. This testimony may have been relevant to an element of aggravated murder that the State of Ohio had to prove at the *guilt* phrase, Ohio Rev. Code Ann. §§ 2903.01(A) and 2929.04(A)(7) (Page's 1987), but it was not relevant at the penalty phase and the Ohio Supreme Court so concluded. *State v. Huertas*, 51 Ohio St. 3d at 26, 553 N.E.2d at 1064.

502. The testimony of Mrs. Harris was an extreme instance of this type of emotionally freighted evidence, and its admission violated the precepts of *Booth v. Maryland*, *Id.*, and *South Carolina v. Gathers*, —— U.S. ——, 109 S. Ct. 2207 (1989).

1.

At the close of the defense case in the penalty phase, the State offered a presentence investigation report into evidence. The report contained a statement from the victim's parents, Mr. and Mrs. Harris. (J.A. 96.) The State of Ohio then called Mrs. Harris to the witness stand over defense objection. (J.A. 122, 129.) The initial portion of Mrs. Harris's testimony during the direct examination echoed that given by her in the first phase of the trial. Contained within this penalty phase testimony were emotional expressions of her grief. (J.A. 131-32.) The remainder of Mrs. Harris's testimony described the good character of her son and the impact of her son's death on her grandson, Ralph Harris III.[8] Mrs. Harris testified as follows:

> Q. Ma'am, were you proud of your son, Ralph Harris, Jr.?
>
> A. Oh, God, how proud I was, a child that never give me no problem, no nothing, no drinking, no smoking, nothing but go to church and come back and do his Army, work out for Karate.
>
> Oh, God, no dope, no nothing; and he wanted to be something.
>
> Q. Does Ralph Harris, III, miss his father?
>
> A. Oh, God, yes. I hate to take him to the graveyard. He always wants to go. He think he going to see his dad. Oh, dear God, please help us, help us, Lord, Jesus.
>
> MR. ROSENBAUM. I have no other questions, Your Honor.
>
> A. Jesus.

[8] The presentence investigation report also contained references to the good character of the victim. (J.A. 162.)

THE COURT: Do you want to take a drink of water, Mrs. Harris?

A. Oh, what a good kid. Oh, Jesus, help me. Please help me.

(J.A. 133-34.)

A review of the presentence report and Mrs. Harris's testimony reveals that both discussed the personal characteristics of the victim. Mrs. Harris's testimony also reflected the emotional impact of the murder on the Harris family. The brevity of this testimony did not diminish its impact. As the Ohio Supreme Court concluded, "Mrs. Harris's grief-stricken, emotional testimony is compelling even in a cold transcript; it is almost impossible to believe that a jury could hear it and remain unaffected." *State v. Huertas*, 51 Ohio St. 3d 22, 25, 553 N.E.2d 1058, 1063-65 (1990). Mrs. Harris's testimony was *live* testimony. It was not submitted to the jury merely in a written victim impact statement as was the case in *Booth v. Maryland*, 482 U.S. at 496. The jury here was exposed to the full emotional impact of Mrs. Harris's grief.

2.

Mrs. Harris's testimony concerning her son's characteristics and the emotional impact his death had on the family was "irrelevant to [the] capital sentencing decision and . . . create[d] a constitutionally unacceptable risk that the jury . . . impose[d] the death penalty in an arbitrary and capricious manner." *Booth v. Maryland*, 482 U.S. at 502-03. The Ohio Supreme Court found the emotional testimony of Mrs. Harris to be inadmissible in this context. The Ohio Supreme Court did *not*, contrary to Petitioner's assertion, issue a blanket prohibition against all victim impact evidence in all capital cases.[9]

[9] One of the justices in the majority separately concurred to make clear that there was no constitutional ban on all victim impact evidence in Ohio. The majority simply found that the exception

The Ohio Supreme Court recognized that "there may be an exception to the *Booth* rule when the victim impact evidence relates to the circumstances of the crime." *State v. Huertas*, 51 Ohio St. 3d at 1064, 553 N.E.2d 26. The State argued in the Court below that this exception applied because Ediberto Huertas was acquainted with the victim. *Id.* The Ohio Supreme Court rejected this argument by stating:

> In most cases, the mere fact that the killer knows his victim does not make him more or less deserving of the death penalty. For example, if appellant and Ralph Harris had not been friends, and all other circumstances had been the same, we doubt that anyone would consider the crime less heinous.

Id. The Ohio Supreme Court then concluded that the evidence that Ediberto Huertas and Ralph Harris, Jr., were acquainted did not relate to Mr. Huertas's "personal responsibility and moral guilt." *Id.* Nor did their acquaintance make Ralph Harris, Jr.'s good character as described by his mother any less "irrelevant to [Ediberto Huertas's] decision to kill . . . and . . . wholly unrelated to [his] blameworthiness." *Booth v. Maryland*, 482 U.S. at 504-505. There is no evidence that Ediberto Huertas chose to kill Ralph Harris, Jr., in order to cause emotional distress to the Harris family. At no point during trial was any evidence adduced that the impact of the crime on the Harris family contributed to Respondent's decision to kill. The Ohio Supreme Court concluded that it had not. The Ohio Supreme Court, however, did recognize that victim impact evidence could be admitted if a capital defendant's motive for killing was to inflict emotional trauma on the victim's family.[10]

announced in *Booth* did not apply to the present case. *State v. Huertas*, 51 Ohio St. 3d at 33, 553 N.E.2d at 1070.

[10] To support this proposition, the Ohio Supreme Court cited an Ohio case, *State v. Morales*, 32 Ohio St. 3d 252, 513 N.E.2d 267 (1987), where such a motive was present. *State v. Huertas*, 51

No such motive was proffered in this case. Mr. Huertas's alcohol and drug consumption, combined with his anger at Elba Ortiz and Ralph Harris, Jr., precipitated the events of that evening. At no point did the emotional impact on the Harris family enter the calculus. Mr. Huertas did not "select [his] victim[] based on whether the murder [would] have an effect on anyone other than [Ralph Harris, Jr.]" *Booth v. Maryland*, 482 U.S. at 504.

Since the Ohio Supreme Court found that Respondent Huertas did not commit the aggravated murder to cause emotional trauma to the Harris family, the Ohio Supreme Court was correct in concluding that Mrs. Harris's testimony concerning this trauma was irelevant to the capital sentencing decision under *Booth* and *Gathers*. It was "wholly unrelated to the blameworthiness" of Respondent Huertas for the capital crime, *id.* at 504, and did not bear upon his "personal responsibility and moral guilt," *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

The fact that Respondent knew the Harrises and could have anticipated their grief is similarly irrelevant. As this Court explained in *Booth*:

> It is true that in certain cases some of the information contained in a VIS will have been known to the defendant before he committed the offense. As we have recognized, a defendant's degree of knowledge of the probable consequences of his actions may increase his moral culpability in a constitutionally significant manner (citation omitted). *We nevertheless find that because of the nature of the information contained in a VIS, it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner.*

Id. at 505. (Emphasis added.) If knowledge of the victim's family were decisive of the constitutional propriety

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Ohio St. 3d at 26, n.4, 553 N.E.2d at 1064, n.4. In *Morales*, the victim was killed as part of a revenge plot against his older brother. *Id.*

of admitting victim impact evidence, this Court would have said so in *Booth*. In *Booth*, the defendant was a neighbor of the victims and he knew that the Bronsteins could identify him. *Id.* at 493. He could have anticipated the emotional trauma that the loss of their parents would cause the Bronstein family. Yet this Court found the victim impact statement inadmissible.

A rule which turns the admissibility of victim impact evdence on the degree of the defendant's acquaintance with the victim would be neither practicable nor pertinent to the underlying constitutional concerns. If acquaintanceship served as a basis for admission of the evidence, endless inquiries requiring complex quantifications would result: how well did the defendant know the victim's family; how many members of the victim's family did the defendant know, etc.? This type of inquiry is not only unceasing but "could well distract the sentencing jury from its constitutionally required task-determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." *Booth v. Maryland*, 482 U.S. at 507.

For whether or not the defendant is acquainted with the victim's family, the family's suffering can not constitute grounds for "rational," consistent application of the death penalty. *Barclay v. Florida*, 463 U.S. 939, 960 (1983), (Justices Stevens and Powell, concurring). Evidence of the existence and extent of suffering by survivors will vary according to the nature of each family's grief and other nonuniform factors including how eloquently the family members are able to articulate their distress at the sentencing hearing.

3.

The use of victim impact evidence at a capital sentencing hearing cannot be reconciled with the basic concerns of this Court's Eighth Amendment jurisprudence

since *Furman v. Georgia*, 408 U.S. 238 (1972). The sentencer's discretion in a capital case must be channeled by "clear and objective standards that provide specific and detailed guidance. . . ," *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), to "minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (Opinion of Justices Stewart, Powell and Stevens). The decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion." *Zant v. Stephens*, 462 U.S. 862, 885 (1983), quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

The "question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime." *Satterwhite v. Texas*, 486 U.S. 249, 108 S. Ct. 1792, 1800 (1988) (Justices Marshall, Brennan and Blackmun, concurring). It "should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed should reflect a reasoned *moral* response to the defendant's background, character and crime rather than mere sympathy or emotion." *California v. Brown*, 479 U.S. 538, 545 (1987) (Justice O'Connor, concurring). Victim impact evidence by its very nature diverts the sentencer's attention from the critical assessment of the defendant's conduct and blameworthiness. It encourages sentencing to be based on a visceral response to the suffering of the victim's family.

Victim impact evidence does *not* support a reasoned, moral response. It evokes an emotion-based response. Evidence of the impact of the capital crime upon the particular victim's family does not reflect the moral values of the community as a whole.[11]

[11] "It [is the legislature], the elected representatives of the people that [is] 'constituted to respond to the will and consequently the moral values of the people.'" *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972)).

The legislature expresses those values by defining the acts that constitute crimes and prescribing the punishments for those crimes. In the case of a capital crime, the legislature identifies the characteristics—including victims' characteristics—that generally and objectively warrant enhanced punishment. The legislature takes account of these characteristics by making them either elements of the capital offense or aggravating circumstances. This legislative process simultaneously ensures that the death penalty is imposed only "upon a defendant whose 'crime . . . reflect[s] a consciousness materially more depraved than that of any person guilty of murder,'" *Cabana v. Bullock*, 474 U.S. 376, 406 (1986) (Justices Stevens and Brennan, dissenting), quoting *Enmund v. Florida*, 458 U.S. 782, 800-01 (1982), and that the "magnitude of the punishment imposed . . . [is] related to the degree of harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness", *Enmund v. Florida*, 458 U.S. at 815 (Justices O'Connor, Powell and Rehnquist, dissenting). Through statutory specification of the pertinent characteristics, society's judgment of the harm done to victims and their survivors enters into the capital sentencing determination in a regular, uniform manner that leaves no need or room for the introduction also of each individual victim's family's private assessment of its loss, with all of the vagaries that such assessments necessarily entail.

4.

In particular, Ohio's capital sentencing procedure does not permit the sentencer to consider emotional harm to the victim's family as a factor in determining punishment. Both the Ohio legislature and the Ohio Supreme Court have spoken clearly on this point. Three statutes in Ohio govern the admission of victim impact information. Ohio Rev. Code Ann. §§ 2943.041, 2945.07 (Page's 1989) and 2947.051 (Page's 1987). These sections concern the right of the victim or a family member to be present at trial and sentencing; the right of the victim or family member to make a statement; and the use of

this victim impact statement at sentencing. None of the sections applies to capital murder cases.

Sections 2943.041 and 2945.07 provide a detailed list of the crimes covered by these statutes. Specifically absent from each statute is capital murder. The remaining section, 2947.051, provides that victim impact information must be considered by the trial judge in any felony case in assessing a fine or determining the minimum sentence for a felony with an indefinite term. The Ohio Supreme Court has concluded that this statute does not apply to capital murder. *State v. Post*, 32 Ohio St. 3d 380, 383, 513 N.E.2d 754, 758 (1987), *cert. denied*, 484 U.S. 1079 (1988).

Likewise, the Ohio Supreme Court has for some time recognized that evidence pertaining to a victim's background is irrelevant and immaterial to the guilt or innocence of the accused and the penalty to be imposed. In *State v. White*, 15 Ohio St. 2d 146, syl. 2, 239 N.E. 2d 65, syl. 2 (1968), the court held that "[t]he use by the State of evidence of the victim's background, and reliance upon such evidence in its argument for the death penalty, is improper and constitutes error. . . ." The court then went on to state that "the principal reason for the prejudicial effect is that it serves to inflame the passion of the jury with evidence collateral to the principal issue at bar." *Id.* at 151, 239 N.E.2d at 70.

Thus, there is a specific judgment by the Ohio legislature and the Ohio Supreme Court that victim impact evidence should not be considered in capital sentencing proceedings because of its inflammatory nature. This judgment is controlling in Ohio and deserves deference by this Court. The legislature has responded to the moral values of the citizens of Ohio in defining aggravated murder and the statutory aggravating circumstances which create death eligibility. *Booth v. Maryland*, 482 U.S. at 515, (Justices White, Rehnquist, O'Connor, and Scalia, dissenting). The legislature has also responded to these

same moral values by prohibiting the consideration of victim impact evidence at capital sentencing proceedings.[12]

5.

We respectfully ask this Court to recognize what the Ohio legislature and the Ohio Supreme Court have recognized: that emotion-laden testimony offered by the victim's family is not an appropriate consideration in a capital case. The harm incurred by the victim and the victim's family as it bears upon the punishment to be inflicted for a murder is best measured through the pronouncements of the legislature, not through the victim's family. To allow the idiosyncratic reactions of family members and the poignancy with which they express their grief to affect the choice of sentence would undermine the reliability demanded in capital cases. This Court's "Eighth Amendment jurisprudence has been concerned with eliminating emotion from sentencing decisions." *Caldwell v. Mississippi*, 472 U.S. 320, 349 (1985) (Chief Justice Rehnquist, dissenting). The admission of victim impact evidence contravenes the bedrock principles of this jurisprudence. "It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with [the Court's] long-standing recognition that, above all, capital sentencing must be reliable, accurate and nonarbitrary." *Saffle v. Parks*, —— U.S. ——, 110 S. Ct. 1257, 1262 (1990). A death sentence based on emotion-laden victim impact evidence is not constitutional.

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[12] The Ohio legislature is not the only legislature that has concluded that victim impact evidence should be precluded in a capital case. Colorado Rev. Stat. § 16-11-102 (1990) (passed in 1977); Connecticut Gen. Stat. Ann. § 54-91a (1989) (passed in 1976); Georgia Code Ann. §§ 27-2502.1, 27-2502.2 (1985) (passed in 1985); Indiana Code § 35-38-1-85 (1990) (passed in 1990); Oklahoma Stat. Ann. Tit. 22, § 982 (West. 1982) (passed in 1982); 42 Pennsylvania Cons. Stat. Ann. § 9731 (Purdon 1980) (passed in 1980); South Carolina Code Ann. § 16-3-1550(A) (Law Co-Op 1988) (passed in 1984), and Virginia Code Ann. § 19.2-299.1 (1989) (passed in 1989).

CONCLUSION

The decision of the Ohio Supreme Court vacating Respondent's death sentence, because of the erroneous admission of the opinion testimony of Ralph Harris, Sr., should neither be reviewed nor reversed by this Court. Its state-law underpinnings make it an inappropriate vehicle for constitutional adjudication; but if it is reviewed, it is plainly correct as a matter of constitutional law in light of those state-law underpinnings. It offers no occasion for the Court to revisit any issue under *Booth v. Maryland* or *South Carolina v. Gathers.*

The judgment below is alternatively sustainable because the admission of Elizabeth Harris's emotional testimony about her son, her grief, and her grandson's grief violated *Booth* and *Gathers.* Those decisions properly protect the rationality and reliability of the capital sentencing process against distortion by inflammatory evidence of which Mrs. Harris's testimony is an extreme example.

Certiorari should be dismissed as improvidently granted or the judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

OHIO REVISED CODE

CHAPTER 2903: HOMICIDE AND ASSAULT

HOMICIDE

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by

force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

CHAPTER 2929: PENALTIES AND SENTENCING

PENALTIES FOR MURDER

§ 2929.02 Penalties for murder.

(A) Whoever is convicted of, pleads guilty to, or pleads no contest and is found guilty of, aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 [2929.02.3] or division (C) of section 2929.05 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of, pleads guilty to, or pleads no contest and is found guilty of, murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years

to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the

consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a

penalty, the court, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the argument, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration to the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing out weigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment.

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment.

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opin-

ion its specific findings as to the existence of any of the mitigation factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division wtih the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

PENALTIES FOR MURDER

§ 2929.01 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detection facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, who the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping,

rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked

substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

§ 2943.041 Rights of victim or representative family member present at hearing or proceeding.

(A) In any case in which a person is charged with a violation of section 2903.02, 2903.03, 2903.04, 2903.06, 2903.11, 2903.12, 2903.13, 2903.21, 2903.022, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.12, 2909.02, 2909.03, 2909.05, 2911.01, 2911.02, 2911.11, 2911.03, 2909.05, 2911.01, 2911.02, 2911.11, 2911.12, 2919.25, 2921.03 or 2921.04 of the Revised Code, a violation of

section 2903.01 of the Revised Code in which the indictment or count in the indictment does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, a felony violation of section 2903.07 of the Revised Code, or a violation of an existing or former municipal ordinance or law of this or any other state or the United States in situations in which the violation is substantially equivalent to any of those violations, if the charge is resolved without trial through the entry of a nolle prosequi, through the entry of a plea of guilty or no contest, or through any other final disposition other than by trial, the court shall determine whether the victim of the act that was the basis of the charge, or a representative member of the victim's family, if the victim died as a result of that act, is present at the hearing or proceeding at which the charge is resolved. If the court determines that the victim or a representative member of the victim's family is present at the hearing or proceeding, the court shall require the victim's or representative family member's name and the fact that he was present at the hearing or proceeding to be indicated in the record of the case, shall provide the victim or representative family member with the written notice described in division (B) of this section, and shall inform the victim or representative family member that he is entitled to make a statement relative to the victimization and, if applicable, the sentencing of the offender, and the court, subject to any reasonable terms and conditions it imposes, shall permit the victim or representative family member, if he so desires, personally to make such a statement. The court, in its discretion, may require that the statement be made orally or in writing. If a victim or representative member of a victim's family personally makes a statement under authority of this division, the name of the victim or representative family member and the fact that such a statement was made shall be indicated in the record of the case.

(B)(1) In any case in which a person is charged with any violation described in division (A) of this section, if the court determines that the victim of the act that was the basis of the charge, or a representative member of the victim's family if the victim died as a result of that act, is present at a hearing or proceeding of the type described in division (A) of this section and regardless of whether the victim or representative family member makes or is permitted to make a statement at the hearing or proceeding, the court shall provide the victim or representative family member with written notice of all of the following:

(a) The name of the person charged with the violation;

(b) The case or docket number assigned to the charge;

(c) A telephone number or numbers that the victim or representative family member may call in the future, during normal business hours, for information about the final resolution of the charge; about any sentence imposed upon the offender relative to that charge, or, if that charge is dismissed and the person enters a plea of guilty or no contest to a charge of any offense based on or connected with the act that was the basis of that charge or to a charge of any offense that was joined for prosecution with that charge, about any sentence imposed relative to that plea; and about any action taken in relative to that plea; and about any action taken in relation to any such sentence, including whether it has been suspended and the offender has been placed on probation, whether the offender has been granted a furlough, whether the offender has been pardoned or paroled or has had his sentence commuted, and whether any other action has been taken that has resulted or will result in the offender's release from imprisonment prior to the expiration of that sentence.

(2) A notice required by division (B)(1) of this section also shall indicate that if the person charged with the violation is sentenced and his sentence requires that he serve a term of imprisonment in a state penal or reformatory institution, the victim or the representative member of the victim's family may provide the adult parole authority with a memorandum including both an address and telephone number at which notice can be provided to him and the name of the offender, and that if such a memorandum is provided, the victim or representative family member will be notified by the adult parole authority before the offender is recommended for a pardon or commutation or is granted a parole, the victim or representative family member, after receipt of such a notification, may send a written statement relative to the victimization and the pending action to the adult parole authority, and adult parole authority will consider any such statement prior to recommending a pardon or commutation for or granting a parole to the offender. The notice required by division (B)(1) of this section shall include an address and telephone number for the adult parole authority.

(3) The court shall ensure that the notice required by division (B)(1) of this section is provided to a particular victim or a representative member of his family no later than the date of the sentencing of the person charged with committing an offense against that victim. If a victim or representative member of a deceased victim's family who is provided the notice required by division (B)(1) of this section calls a telephone number, during normal business hours, that the notice indicates may be called for information, and identifies himself, the person charged with the violation described in division (A) of this section, and the case or docket number assigned to the offense or count charged, the victim or the representative family member shall be informed of the final resolution of the charge, and, if applicable, any

sentence imposed upon the person relative to that charge or relative to a plea to a charge based on or connected with that charge or a plea to a charge that was joined for prosecution with that charge, and any action taken in relation to any such sentence.

(C) If a statement is given orally at a hearing or proceeding, under authority of division (A) of this section, by a victim or a representative member of a victim's family, the court shall order the statement to be transcribed or recorded. If such a statement is given, either orally or in writing, and the person who was charged with the offense is sentenced to serve a term of imprisonment relative to the charge for which the statement was made or relative to a plea to a charge based on or connected with that charge or a plea to a charge that was joined for prosecution with that charge, the transcribed or recorded oral statement or the submitted written statement shall be sent to the adult parole authority, if the term of imprisonment is to be served in a state penal or reformatory institution, or to the department of probation established by or the probation officer appointed by the court in which the sentence was imposed, if the term of imprisonment is to be served in a county jail, county rehabilitation work camp, jail or workhouse established by more than one municipal corporation or by one or more counties and one or more municipal corporations. In no case shall any such statement be included in any record at the institution in which the person is incarcerated. The adult parole authority or probation department or officers shall maintain a file of transcripts and recordings and written statements it is sent under this division.

(D) The failure of a court to comply with the provisions of this section does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to the defendant in the case.

History: 142 v. S 6. Eff. 6-10-87.

§ 2945.07 Rights of victim or representative family member present at trial.

(A)(1) In any case in which a person is charged with a violation of section 2903.02, 2903.03, 2903.04, 2903.06, 2903.11, 2903.12, 2903.13, 2903.21, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.12, 2909.02, 2909.03, 2909.05, 2911.01, 2911.02, 2911.11, 2911.12, 2919.25, 2921.03, or 2921.04 of the Revised Code, a violation of section 2903.01 of the Revised Code in which the indictment or count in the indictment does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, a felony violation of section 2903.07 of the Revised Code, or a violation of an existing or former municipal ordinance or law of this or any other state or the United States in situations in which the violation is substantially equivalent to any of those violations, if the person is brought to trial on the charge the court shall determine whether the victim of the act that was the basis of the charge, or a representative member of the victim's family if the victim died as a result of that act, is present at the trial. If the person is tried before a jury, the court shall not make the determination in the presence of the jury. If the court determines that the victim or a representative member of the victim's family is present at any session of the trial, the court shall require the victim's or representative family member's name and the fact that he was present at the trial to be indicated in the record of the case and shall provide the victim or the representative family members with the written notice described in division (B) of this section.

(2) In any case in which a person is charged with any violation described in division (A) of this section, if the person is brought to trial on the charge and is convicted of that offense or another offense arising out of the act that was the basis of the charge, the court, prior to imposing sentence on the offender, shall determine whether the victim of the act that was the basis of the charge, or a representative member of the victim's family if the victim died as a result of that act, is present at the sentencing phase of the trial. If the court determines that the victim or a representative member of the victim's family is present at that phase, the court shall inform the victim or representative family member that he is entitled to make a statement relative to the victimization and the sentencing of the offender, and the court, subject to any reasonable terms and conditions it imposes, shall permit the victim or representative family member if he so desires personally to make a statement at the time of sentencing relative to the victimization and the sentencing of the offender. The court, in its discretion, may require that the statement be made orally or in writing. If a victim or representative member of a victim's family personally makes a statement under authority of this division, the name of the victim or representative family member and the fact that the statement was made shall be indicated in the record of the case.

(B)(1) In any case in which a person is charged with any violation described in division (A)(1) of this section, if the court determines that the victim of the act that was the basis of the charge, or a representative member of the victim's family if the victim died as a result of that act, is present at any session of the trial on the charge, the court shall provide the victim or representative family member with written notice of all of the following:

(a) The name of the person charged with violation;

(b) The case or docket number assigned to the charge;

(c) A telephone number or numbers that the victim or representative family [member] may call in the future, during normal business hours, for information about the final resolution of the charge, about any sen-

tence imposed upon the defendant relative to that charge, and about any action taken in relation to any such sentence, including whether it has been suspended and the defendant has been placed on probation, whether the defendant has been granted a furlough, whether the defendant has been pardoned or paroled or has had his sentence commuted, and whether any other action has been taken that has resulted or will result in the defendant's release from imprisonment prior to the expiration of that sentence.

(2) A notice required by division (B)(1) of this section also shall indicate that if the person charged with the violation is sentenced and his sentence requires that he serve a term of imprisonment in a state penal or reformatory institution, the victim or the representative member of the victim's family may provide the adult parole authority with a memorandum including both an address and telephone number at which notice can be provided to him, and the name of the offender, and that if such a memorandum is provided, the victim or representative family member will be notified by the adult parole authority before the defendant is recommended for a pardon or commutation or is granted a parole, the victim or representative family member, after receipt of such a notification, may send a written statement relative to the victimization and the pending action to the adult parole authority, and the adult parole authority will consider any such statement prior to recommending a pardon or commutation for or granting a parole to the defendant. The notice required by division (B)(1) of this section shall include an address and telephone number for the adult parole authority.

(3) The court shall ensure that the notice required by division (B)(1) of this section is provided to a particular victim or a representative member of his family no later than the date of the sentencing of the person charged with committing an offense against that victim.

If a victim or representative member of a deceased victim's family who is provided the notice required by division (B)(1) of this section calls a telephone number, during normal business hours, that the notice indicates may be called for information, and identifies himself, the person charged with the violation described in division (A)(1) of this section, and the case or docket number assigned to the offense or count charged, the victim or the representative family member shall be informed of the final resolution of the charge, and, if applicable, any sentence imposed upon the person charged, and any action taken in relation to any such sentence.

(C) If a statement is given orally at the time of sentencing of an offender, under authority of division (A)(2) of this section, by a victim or a representative member of a victim's family, the court shall order the statement to be transcribed or recorded. If the statement is given, either orally or in writing, and the offender is sentenced to serve a term of imprisonment relative to the offense for which the statement was made, the transcribed or recorded oral statement or the submitted written statement shall be sent to the adult parole authority, if the term of imprisonment is to be served in a state penal or reformatory institution, or to the department of probation established by, or the probation officers appointed by, the court in which the sentence was imposed, if the term of imprisonment is to be served in a county jail, county rehabilitation work camp, jail or workhouse of a municipal corporation, or jail or workhouse established by more than one municipal corporation or by one or more counties and one or more municipal corporations. In no case shall any such statement be included in any record at the institution in which the person is incarcerated. The adult parole authority or probation department or officers shall maintain a file of transcripts and recordings and written statements it is sent under this division.

(D) The failure of a court to comply with the provisions of this section does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to the defendant in the case.

§ 2947.051. Victim impact statement to be considered in imposing sentence.

(A) In all criminal cases in which a person is convicted of, pleads guilty to and the plea is accepted to, or pleads no contest to and is found guilty of a felony, the court shall, prior to sentencing the offender, order the preparation of a victim impact statement by the department of probation of the county in which the victim of the offense resides, by the court's own regular probation officer, or by a victim assistance program that is operated by the state, any county or municipal corporation, or any other governmental entity if the offender caused, attempted to cause, threatened to cause, or created the risk of physical harm to the victim of the offense. The court shall, in accordance with sections 2929.12 and 2929.14 of the Revised Code, consider the victim impact statement in determining the sentence to be imposed upon the offender.

(B) Each victim impact statement shall identify the victim of the offense, itemize any economic loss suffered by the victim as a result of the offense, identify any physical injury suffered by the victim as a result of the offense and the seriousness and permanence of the injury, identify any change in the victim's personal welfare or familial relationships as a result of the offense and any psychological impact experienced by the victim or the victim's family as a result of the offense, and any psychological impact experienced by the victim or the victim's family as a result of the offense, and contain any other information related to the impact of the offense upon the victim that the court requires.

(C) A victim impact statement shall be kept confidential and is not a public record as defined in sections

149.43 of the Revised Code. However, the court may furnish copies of the statement to both the defendant or his counsel and the prosecuting attorney. Any copies of a victim impact statement that are made available to the defendant or his counsel or to the prosecuting attorney shall be returned by the person to whom they were made available to the court immediately following the imposition of sentence upon the defendant.

History: 138 v. S 384 (Eff. 10-22-80); 139 v. S 199. Eff. 1-5-83

§ 16-11-102. Presentence or probation investigation.

(1) Following the return of a verdict of guilty of a felony, other than a class 1 felony, or folowing a finding of guilt on such charge where the issues were tried to the court, or on a plea of guilty or nolo contendere to such a charge, or upon order of the court in any misdemeanor conviction, the probation officer shall make an investigation and written report to the court before the imposition of sentence. Each presentence report shall include, but not be limited to, information as to the defendant's family background, educational history, employment record, and past criminal record, an evaluation of the alternative dispositions available for the defendant, the information required by the court pursuant to section 16-11-204.5, a victim impact statement, and such other information as the court may require. A victim impact statement shall be prepared by the district attorney's office on and after September 1, 1985. The department of social services shall provide the district attorney's office with the information necessary for the preparation of a victim impact statement. In addition, the court, in cases that it deems appropriate, may require the presentence report to include the findings and results of a professionally conducted psychiatric examination of the defendant. No less than seventy-two hours prior to the sentencing hearing, copies of the presentence report, including any recommendations as to probation, shall be furnished to the prosecuting attorney and defense counsel or to the defendant if he is unrepresented. A copy of the presentence report shall be transmitted to the department of corrections together with the mittimus.

(1.1) As a part of any presentence or probation investigation, the probation officer shall require each defendant to complete the form provided to the judicial department by the office of the attorney general pursuant

to section 17-10-104, C.R.S. Each completed form shall become part of the presentence report and, if such defendant is sentenced to imprisonment under the supervision of the department of corrections, or placed on probation supervision by the sentencing court, a copy of the completed form shall be forwarded to the office of the attorney general by the probation officer.

(1.5) A victim impact statement may include the following:

(a) An identification of the victim of the offense;

(b) An itemization of any economic loss suffered by the victim as a result of the offense as prepared by the district attorney's office at the time the offense is filed;

(c) An identification of any physical injury suffered by the victim as a result of the offense, including information on its seriousness and permanence;

(d) A description of any change in the victim's personal welfare or familial relationships as a result of the offense;

(e) The identification of any request for psychological services initiated by the victim or the victim's family as a result of the offense;

(f) Any other information related to the impact of the offense upon the victim that the court requires.

(2) The report of the probation officer and the procedures to be followed at the time sentence is imposed and final judgment is entered shall be as required by the Colorado rules of criminal procedure. In addition to the requirements of such rules, the report shall include a statement showing the amount of time during which the defendant was imprisoned awaiting trial upon the charge resulting in conviction.

(3) The court, upon its own motion or upon the petition of the probation officer, may order any defendant

who is subject to presentence investigation or who has made application for probation to submit to a mental and physical examination.

(4) The court, with the concurrence of the defendant and the prosecuting attorney, may dispense wtih the presentence examination and report: except that a report containing the information required by the court pursuant to section 16-11-204.5 and a victim impact statement shall be made in every case, and the amount of restitution shall be fixed by the court at the time of sentencing and shall be endorsed upon the mittimus.

(5) After receiving the presentence report and before imposing sentencing, the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment. The prosecution also shall be given an opportunity to be heard on any matter material to the imposition of sentence. The court shall then sentence the defendant pursuant to the provisions of this article and section 18-1-105, C.R.S.

(6) Following the return of a verdict of guilty of a felony, or a finding of guilt on such charge where the issues were tried to the court, or on a plea of guilty or nolo contendere to such a charge, the district attorney may file with the court identification photographs and fingerprints of the defendant or defendants, and such identification photographs and fingerprints shall become part of the court record. Such identification photographs and fingerprints of the defendant or defendants shall constitute prima facie evidence of identity under section 16-13-102.

CONNECTICUT CRIMINAL PROCEDURE

Sec. 54-91a (Formerly Sec. 54-109. Presentence investigation of defendant.

(a) No defendant convicted of a crime, other than a capital felony, the punishment for which may include imprisonment for more than one year, may be sentenced, or his case otherwise disposed of, until a written report of investigation by a probation officer has been presented to and considered by the court, if (1) the defendant is so convicted for the first time in this state or (2) his record, as shown by the prosecuting official, discloses a conviction obtained prior to five years from the finding of guilty in the present prosecution; but any court may, in its discretion, order a presentence investigation for a defendant convicted of any crime or offense other than a capital felony.

(b) A defendant who is convicted of a crime and is not eligible for sentence review pursuant to section 51-195 may, with the consent of the sentencing judge and the prosecuting official, waive the presentence investigation.

(c) Whenever an investigation is required, the probation officer shall promptly inquire into the circumstances of the offense, the attitude of the complainant or victim, or of the immediate family where possible in cases of homicide, and the criminal record, social history and present condition of the defendant. Such investigation shall include an inquiry into any damages suffered by the victim, including medical expenses, loss of earnings and property loss. All local and state police agencies shall furnish to the probation officer such criminal records as the probation officer may request. When in the opinion of the court or the investigating authority it is desirable, such investigation shall include a physical and mental examination of the defendant. If the defendant is committed to any institution, the investigating agency shall send the reports of such investigation to the institution at the time of commitment.

GEORGIA CRIMINAL PROCEDURE

27-2502.1 [17-10-1.1] Victim impact statement.

(a) Except in cases in which life imprisonment or the death penalty must be imposed, prior to the fixing of the sentence as provided for in Code Section 17-10-1 [27-2502], the judge may consider a victim impact statement in determining the appropriate sentence and in entering any order of restitution to the victim if:

(1) The defendant, in committing a felony, caused physical, psychological, or economic injury to the victim, or

(2) The defendant, in committing a misdemeanor, caused serious physical injury or death to the victim.

(b) A victim impact statement shall:

(1) Identify the victim of the offense and perpetrator;

(2) Itemize any economic loss suffered by the victim as a result of the offense;

(3) Identifying any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

(4) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(5) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

(6) Contain any other information related to the impact of the offense upon the victim that the court requires.

(c) The State Board of Pardons and Paroles shall establish a form document which shall include the elements set forth in subsection (b) of this Code section and shall make copies of such form available to prosecuting attorneys in the state. When requested by the

victim, the impact statement form document shall be provided to the victim by the prosecuting attorney. The form shall include the address of the State Board of Pardons and Paroles and contain a statement that the victim must maintain a copy of his address with the State Board of Pardons and Paroles and must notify the board of any change of address.

(d) The victim may complete the victim impact statement form and submit such form to the appropriate prosecuting attorney charged with the prosecution of the case. If the victim is unable to do so because of such victim's mental, emotional, or physical incapacity, or because of such victim's age, the victim's attorney or a family member may complete the victim impact statement form on behalf of the victim. Prior to the sentencing, the prosecuting attorney shall file any such written victim impact statement, if in existence at that time, with the court and shall make it available to the defendant.

(e) The court shall, in the manner prescribed by rule of court, allow the defendant to have the opportunity to rebut the victim's written statements.

(f) If for any reason a victim was not allowed an opportunity to make a written victim impact statement, the victim may submit a victim impact statement to the State Board of Pardons and Paroles in any case prior to consideration of parole.

(g) No sentence shall be invalidated because of failure to comply with the provisions of this Code section. This Code section shall not be construed to create any cause of action of any person.

27-2502.2 [17-10-1.2] Oral victim impact statement.

(a) Except in cases in which life imprisonment or the death penalty must be imposed, prior to the fixing of the sentence as provided for in Code Section 17-10-1 [27-2502], the court within its discretion, may allow any

victim or his representative who elects to make an oral victim impact statement the opportunity to do so in the presence of the defendant before rendering the appropriate sentence and in entering any order of restitution to the victim. Such oral statement may be considered in cases where:

(1) The defendant, in committing a misdemeanor, caused physical, psychological, or economic injury to the victim, or

(2) The defendant, in committing a misdemeanor, caused serious physical injury or death to the victim.

(b) In making an oral statement, the victim shall, if applicable:

(1) Describe the nature of the offense;

(2) Itemize any economic loss suffered by the victim as a result of the offense;

(3) Identifying any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

(4) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(5) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

(6) Include any other information related to the impact of the offense upon the victim that the court inquires of.

(c) The court shall, in the manner prescribed by rule of court, allow the defendant to have the opportunity to rebut the victim's oral statements.

(d) No sentence shall be invalidated because of failure to comply with the provisions of this Code section. This Code section shall not be construed to create any cause of action or any right of appeal on behalf of any person.

INDIANA CRIMINAL PROCEDURE

35-38-1-8 Presentence report to be considered by court before sentencing; advisement of victim of right to make statement.

Sec. 8 (a) A defendant convicted of a felony may not be sentenced before a written presentence report is prepared by a probation officer and considered by the sentencing court. Delay of sentence until a presentence report is prepared does not constitute an indefinite postponement or suspension of sentence.

(b) A victim present at sentencing in a felony or misdemeanor case shall be advised by the court of a victim's right to make a statement concerning the crime and the sentence. As added by P.L. 311-1983, Sec. 3. Amended by P.L. 131-1985, Sec. 16.

35-38-1-8.5 Presentence investigation; notice to victim; victim impact statement contents.

Sec. 8.5. (a) This section does not apply when the prosecuting attorney has so sought a sentence of death for a defendant under IC 35-50-2-9.

OKLAHOMA CRIMINAL PROCEDURE

§ 982. Presentence investigation.

Whenever a person is convicted of a felony except when the death sentence is imposed, the court shall, before imposing sentence to commit any felon to incarceration by the Department of Corrections, order a presentence investigation to be made by the Division of Probation and Parole of the Department. The Division shall thereupon inquire into the circumstances of the offense. This information shall include the voluntary statement of the victim concerning the offense, the amount of the loss of the victim, and the criminal record, social history and present condition of the convicted person. The Division shall make a report of such investigation to the court, including a recommendation as to appropriate sentence, and specifically a recommendation for or against probation. Such reports must be presented to the judge so requesting, within a reasonable time, and upon the failure to so present the same, the judge may proceed with sentencing. Whenever, in the opinion of the court or the Division, it is desirable, the investigation shall include a physical and mental examination of the convicted person. The reports so received shall not be referred to, or be considered, in any appeal proceedings. Before imposing sentence, the court shall advise the defendant or his counsel and the district attorney of the factual contents and the conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. If either the defendant or the district attorney desires, such hearing shall be ordered by the court providing either party an opportunity to offer evidence proving or disproving any finding contained in such report, which shall be a hearing in mitigation or aggravation of punishment.

If the district attorney and the defendant desire to waive such presentence investigation and report, both shall execute a suitable waiver subject to approval of the court, whereupon the judge shall proceed with the sentencing.

PENNSYLVANIA CRIMINAL PROCEDURE

§ 9731. Requirement for presentence investigation and report.

Before sentencing any defendant to one year or longer, a presentence investigation and report shall be made, unless the sentence is death or a mandatory sentence to life imprisonment, or unless the court specifically orders to the contrary. The report shall be made within 30 days from the date of conviction of defendant or within such greater period of time as the court shall direct.

SOUTH CAROLINA CRIMINAL PROCEDURE

§ 16-3-1550. Victim impact statement.

(A) The provisions of this section govern the disposition of any offense within the jurisdiction of the General Sessions Court, excluding any crimes for which a sentence of death is sought, in any case which involves an identified victim whose whereabouts are known.

(B) It is the responsibility of the solicitor's victim or witness assistance unit in each judicial circuit or a representative designated by the solicitor or law enforcement agency handling the case to advise all victims of their right to submit to the court, orally or in writing at the victim's option, a victim impact statement to be considered by the judge at the sentencing or disposition hearing in general sessions court and at a parole hearing. The solicitor's office or law enforcement agency shall provide a copy of the written form to any victim who wishes to make a written report. In those cases which the solicitor determines that there has been extensive or significant impact on the life of the victim, the Victim or Witness Assistance Unit shall assist the victim in completing the form. The victim must submit this statement to the solicitor's office within appropriate time limits set by the solicitor to be filed in the court records by the solicitor's office so it may be available to the defense for a reasonable period of time prior to sentencing. The court shall allow the defendant to have the opportunity to rebut the victim's written statement if the court decides to review any part of the statement before sentencing. If the defendant is incarcerated, the solicitor shall forward a copy of the impact statement to the Parole and Community Corrections Board. Solicitors shall begin using these victim impact statements no later than January 1, 1985.

(C) The Attorney General's Office shall develop a statement form for the victim impact statement. For this purpose, the Attorney General may seek the assistance

of any other state agency or department in developing this form. The Attorney General's office shall distribute this form to all solicitor's offices no later than November 1, 1984.

(D) The victim impact statement shall:

(1) Identify the victim of the offense;

(2) Itemize any economic loss suffered by the victim as a result of the offense;

(3) Identify any physical and psychological injury suffered by the victim as a result of the offense, along with its seriousness and permanence;

(4) Describe any changes in the victim's personal welfare or familial relationships as a result of the offense;

(5) Identify any request for psychological services initiated by the victim or the victim's family as a result of offense;

(6) Contain any other information related to the impact of the offense upon the victim; and

(7) The original of the statement must be included in the court file with one copy for the solicitor and one copy for the victim;

(8) The South Carolina Sentencing Guidelines Commission shall develop appropriate guidelines for general sessions court judges to follow for the purpose of utilizing and considering the victim impact statement, along with all other mitigating and aggravating circumstances, in determining the sentence to be imposed. These guidelines must be developed and distributed no later than December 1, 1984, for use by judges no later than January 1, 1985.

(E) No sentence may be invalidated because of failure to comply with the provisions of this section. This section must not be construed to create any cause of action for monetary damages.

VIRGINIA CRIMINAL PROCEDURE

§ 19.2-299.1. When Victim Impact Statement required; contents; uses.

The presentence report prepared pursuant to § 19.2-299 shall, on motion of the attorney for the Commonwealth with the consent of the victim, in all cases involving abduction, malicious wounding, robbery or criminal sexual assault, include a Victim Impact Statement and may, in the discretion of the court, include a Victim Impact Statement, in any other case except capital murder in which the court determines that the defendant, in committing the felony for which he has been convicted, may have caused significant physical, psychological, or economic injury to the victim. For purposes of this section, a victim is (i) an individual who has suffered physical, psychological or economic harm as a direct result of the commission of a felony, (ii) a spouse, child, parent or legal guardian of a minor victim, or (iii) a spouse, child, parent or legal guardian of a victim of a homicide in non-capital cases.

A Victim Impact Statement, which shall be kept confidential and shall be sealed upon entry of the sentencing order, shall (i) identify the victim, (ii) itemize any economic loss suffered by the victim as a result of the offense, (iii) identify the nature and extent of any physical or psychological injury suffered by the victim as a result of the offense, (iv) detail any change in the victim's personal welfare, lifestyle or familial relationships as a result of the offense, (v) identify any request for psychological or medical services initiated by the victim or the victim's family as a result of the offense, and (vi) provide such other information as the court may require related to the impact of the offense upon the victim.

If the court does not order a presentence investigation and report, the attorney for the Commonwealth may pre-

pare a Victim Impact Statement. The Victim Impact Statement may be considered by the court in determining the appropriate sentence. A copy of the statement prepared pursuant to this section shall be made available to the defendant or counsel for the defendant without court order at least five days prior to the sentencing hearing. The statement shall not be admissible in any civil proceeding for damages arising out of the acts upon which the conviction was based. The statement, however, may be utilized by the Industrial Commission in its determinations on claims by victims of crimes pursuant to Chapter 21.1 (§ 19.2-368.1 et seq.) of this title. (1983, c. 541; 1984, c. 282; 1987, c. 676; 1989, c. 374.)

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
NOV 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 89-1944

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

STATE OF OHIO,
Petitioner,

v.

EDIBERTO HUERTAS,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF OF AMICUS CURIAE, THE STATE OF CALIFORNIA, IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

In California, as in other states, the circumstances of the crime are a proper subject of evidence and argument in the penalty phase. The circumstances of the crime frequently disclose personal characteristics of the victims which are relevant to a fair assessment of the character and personal culpability of the defendant.

This Court's decision in Booth v. Maryland, 482 U.S. 496 (1987), limiting use of victim-impact evidence has limited a circumstance of the crime that deserves consideration by the trier of fact in determining whether death is the appropriate punishment.

This has prevented the prosecution from establishing all relevant evidence concerning the circumstances of the crime and has tipped the scales of fairness against the state. By contrast,

the California Supreme Court has followed the broad language in the decisions of this Court concerning defense mitigating evidence such as Lockett v. Ohio, 438 U.S 586, 604 (1978) and has ruled even the defendant's poetry is admissible in mitigation. People v. Harris, 36 Cal.3d 36, 67-71 (1984).

Thus, California has an interest in having a proper balance returned to the evidence presented with regard to the appropriate penalty to be imposed in a capital case. This can be done if this Court decides to overrule Booth or limit its scope.

Moreover, the California Supreme Court has found certain evidence relevant to show the victim did not resist because such evidence relates to the circumstances of the crime. (People v. Carrera, 49 Cal.3d 291, 336-337 (1989).) However, given the broad reading this Court has

given Booth in South Carolina v. Gathers, ___U.S.____, 104 L.Ed.2d 876, and could give to Booth by upholding the Ohio Supreme Court in this case, the Carrera decision may be open to attack by the defense in federal courts.

California also has an interest in this case to the extent this Court chooses not to overrule Booth, as requested, but to clarify it.

In California expansive interpretations of Booth have been advocated by counsel for capital defendants. In People v. Karis, 46 Cal.3d 612, 640, 641 (1988), the defendant argued that Booth precluded testimony in aggravation by a live prior victim on the ground it was inflammatory in the same way testimony by the victim's family was inflammatory. The court rejected this contention on the ground the impact of a capital defendant's crimes on the victims

of those crimes is relevant to the penalty determination. (Id., at p. 641.)

Yet, similar testimony was found improper in People v. Boyde, 46 Cal.3d 212, 249, (fn. 5.) (1988) aff'd on different grounds Boyde v. California ___U.S.____, 108 L.Ed.2d 316. (See too People v. Clark, 50 Cal.3d 583, 612, 629 (1990)(admission of evidence of victim-impact held to be erroneous, but harmless, even though defendant committed crime to specifically make surviving victim suffer because of her professional status and professional relationship with the defendant.)

These varying interpretations of Booth show there is a need for clarification and limitation of Booth. Because of the amount of California cases that can potentially be affected in varying ways by Booth, California has an

interest in the resolution of the issues in this case.

Other states also have an interest in overruling or clarifying Booth because of confusion it has engendered in these states as well. (See South Carolina v. Gathers, supra, at_____,104 L.Ed.2d 876, 884 (O'Connor, J., dissenting.) See too State v. Huertas, 553 N.E.2d 1058, 1070 (Ohio 1990) Moyer C.J concurring. ("The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in Booth and Gathers differently demonstrates the uncertainty of the law in this area.")

SUMMARY OF ARGUMENT

Booth v. Maryland should be overruled since it precludes the use of victim-impact evidence although this evidence is relevant to the circumstances of the crime

and the defendant's criminal responsibility.

Facts surrounding the murder victim and the impact on his or her family are a circumstance of the crime and the consequence of the defendant's criminal act which deserves consideration by the trier of fact in determining whether death is appropriate.

Moreover, preclusion of this evidence unfairly tips the balance of justice in favor of the defense since the scope of defense mitigating evidence is almost unlimited, yet victim-impact evidence presented by the prosecution bearing on a factor relating to the crime is inadmissible.

Booth should also be overruled as it has been unduly extended in the Gathers case and could be extended even further in this case if this Court upholds the decision of the Ohio Supreme Court.

The victim impact evidence here was responsive to defense evidence and was relevant as the killer knew the victim's family and thus should have been admissible. Extension of Booth to this case evidences a broadening of Booth far beyond its original scope.

If Booth is not overruled, it should be limited in scope so that evidence bearing on the circumstances of the crime, as in Gathers, or in rebuttal to defense evidence, as in this case, is admissible.

ARGUMENT

BOOTH V. MARYLAND SHOULD BE OVERRULED BECAUSE VICTIM-IMPACT EVIDENCE SHOULD BE ADMISSIBLE SO IT CAN BE CONSIDERED BY THE TRIER OF FACT IN DETERMINING WHETHER DEATH IS THE APPROPRIATE PUNISHMENT FOR A CAPITAL MURDER

It is respectfully requested this Court reconsider its decision in

Booth v. Maryland, supra, and overrule it or limit its scope.

This Court has held a jury must make an individualized determination whether a capital defendant should face the death penalty based on the character of the individual and the circumstances of the crime. (Zant v. Stephens, 462 U.S. 862, 879 (1983).

Yet in Booth v. Maryland, supra, five members of this Court concluded victim impact evidence did not contribute to this determination required by the United States Constitution. This conclusion seems to be more of a subjective conclusion as to the lack of probative value of the evidence than one that is supported by Eighth or Fourteenth Amendment jurisprudence. Indeed, there does not appear to be any constitutional foundation for concluding use of this evidence in any given capital case would

automatically result in a violation of the United States Constitution since it does bear on the offense and/or the offender and has a bearing on the defendant's personal responsibility and moral guilt. (See Enmund v. Florida, 458 U.S. 782, 801 (1982).

This Court notes in Booth it is troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy and observes our system of justice does not tolerate such distinctions.

While it is true a State may not encourage reliance on an unconscionable factor such as race of the victim to determine whether death is appropriate, there is no reason why the State cannot include as a sentencing consideration the particularized harm that an individual's

murder caused to the rest of society and the victim's family. (Booth v. Maryland, supra at pp. 516- 517 (White, J., dissenting).) Indeed, there is reason to believe assassination of the President of the United States, state prosecutor, or father of twelve is more egregious than the killing of a drug dealer by another drug dealer during a drug deal that went sour.

Certainly the killer of the President of the United States who has caused the country to come to halt, created potential national security problems, and has disenfranchised many voters deserves a greater moral condemnation than one who kills an ordinary citizen even though both murders were premeditated and carried out under similar circumstances.

In addition, under California law the status of the victim is an element

of many of the special circumstances that are used to limit the category of first degree murderers eligible for the death penalty. For example, California special circumstances include intentional killing of a federal law enforcement officer, fireman, or peace officer while engaged in the performance of their duties. (Pen. Codes, §§ 190.2(a)(7)-190.2(a)(9).) Other special circumstances relate to the killing of a prosecutor, judge or elected or appointed official where the killing was carried out in retaliation for or to prevent the performance of the victim's official duties. (Pen. Codes, §§ 190.2(a)(11)-190.2(a)(13).)

These special circumstances in turn are circumstances of the crime that are considered by the jury in making the penalty determination. (Pen. Code, § 190.3(a).)

Yet, if Booth were carried to its full extent these special circumstances, which were designed to protect persons from becoming victims simply because of their position in society, could be brought into question because they relate to the status of the victim.

Thus, to say the qualities of the victim are not worthy of consideration by the trier of fact unfairly precludes consideration of an important circumstance of the offense. Moreover, whether or not the defendant intended to commit the murder because of certain knowledge about the victim should not be dispositive of the admissibility of victim-impact evidence.

There is nothing that offends sensibilities by holding a murderer accountable not only for his state of mind, but for the full extent of the harm

caused. See Booth v. Maryland, supra at 516 (White, J., dissenting.)

For example, one who drives while under the influence and kills someone as a result of a car accident faces a more severe moral judgment and criminal punishment than one who simply drives while under the influence without harming anyone although neither driver actually intended to harm anyone. Similarly, one who sets fire to a barn and kills two people who by happenstance are in the barn is subject to graver punishment and moral judgment than one who sets fire to the barn and no one dies although neither arsonist intended to harm anyone. In these circumstances, the criminal law looks at the actual consequences of the act not just the knowledge or intent of the defendant. Given this reality of the criminal justice system, there is no reason why a trier of

fact in a capital case should not be able to consider the impact on the victim, his or her family, and society caused by a murder whether or not the defendant knew about these facts. If the defendant specifically intended to harm the victim because he knew the victim or his family this is even a further circumstance in aggravation. It is not just a required predicate for aggravation.

That the harm caused by a defendant's actions is relevant to the capital sentencer's moral judgment concerning the appropriate penalty, even if the defendant did not specifically intend that harm, is a principle recognized both in the decisions of this Court, and legislative decisions concerning appropriate levels of punishment. (See South Carolina v. Gathers, supra, at __U.S.___, 104 L.Ed.2d 876, 888-889. (O'Connor, J., dissenting).

Booth is also based on the concept of specific intent and thus a trier of fact should not consider evidence such as victim-impact evidence of which the defendant had no knowledge or control. However, intent and knowledge are not the issue. The objective facts describing the consequences of the criminal act are what serve as a basis for imposition of the death penalty. If the defendant did intend to commit murder because of knowledge of the victim and his family that may aggravate the case even further, but it does not lead to the conclusion lack of victim-impact specific intent by the defendant means any fact relating to the victim becomes irrelevant. Homicide is the killing of another human being. This fact should not be ignored. Instead, the nature and qualities of the human being who was killed should be made known to the trier of fact who must make an

assessment of the punishment to be imposed. (See South Carolina v. Gathers, supra, ___U.S.____, 104 L.Ed.2d 876, 886 (O'Connor, J., dissenting.) ("Booth should not be read, in my view, to preclude prosecutorial comment which gives the sentencer a 'glimpse of the life' a defendant 'chose to extinguish.'")

This Court's concern over the fact the defendant may not be able to successfully rebut such evidence or may not wish to do so because it would not sit well with the trier of fact is an unnecessary one. (See e.g. Booth v. Maryland, supra at p. 506.) The fact it might not be prudent for the defense to rebut this evidence for tactical reasons should not make the evidence inadmissible. It is probative, relevant evidence and if the defendant chose not to rebut it for tactical reasons that is his choice. It

does not, however, raise an issue of constitutional dimensions.

By analogy, in the penalty phase of most capital cases the defense often will call the defendant's own mother to testify tearfully the defendant had a difficult life and was undeserving of the death penalty. In most cases the prosecution will not cross-examine the mother because of the negative impact such examination would leave on the jury. However, the fact the prosecution chooses not to exercise this right or would not find it prudent to cross-examine the mother does not give the prosecution grounds for complaining about the use of this evidence.

Thus, the fact the defendant may not wish to rebut victim-impact evidence for tactical reasons is not a legal basis for excluding that evidence. (See Booth

v. Maryland, supra, at p. 518 and fn. 3 (White, J., dissenting.)

This Court also expressed concerns that a mini-trial on the victim's character might occur. However, there is no reason why the character of the victim should not be considered just as the character of the defendant is considered as long as evidence of the victim's character is tied in with the matters relating to the circumstances of the offense or the offender.

If the trial court concludes evidence is too far removed from these issues, it may always find the evidence irrelevant and inadmissible. (See e.g. Lockett v. Ohio, supra, 438 U.S. at p. 604, fn. 12 (1978).) (State courts maintain the traditional authority to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the

offense.) (See too Cal. Evid. Code §§ 350-351. (Irrelevant evidence is inadmissible.)[1]

Booth also has tipped the balance unfairly against victims of capital murder and their relatives.[2] Decisions of this Court have repeatedly

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1. California courts also have the discretion to exclude evidence that is relevant if its probative value is substantially outweighed by the probability that its admission will necessitate the undue consumption of time or create substantial danger of prejudice, confusing the issues, or misleading the jury. (Evid. Code, § 352.)

2. McCoy v. North Carolina, ___U.S.___, 108 L.Ed.2d 369, 381, does not compel a contrary conclusion. There, this Court noted a state may not limit a sentencer's consideration of mitigating evidence merely because it places the same limitation on consideration of aggravating circumstances. If this Court overrules Booth, it will not be limiting the type of mitigating evidence the defense can present. Rather, it will be giving the state some parity with the defense by allowing the state to present evidence that bears on the circumstances of the offense. A right that was artificially limited by the Booth decision.

held the Eighth and Fourteenth Amendments require the sentencer in all but the rarest case not be precluded from considering as a mitigating factor any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less that death. (Mills v. Maryland, 486 U.S. 367, 374-375 (1988); Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Lockett v. Ohio, supra, 428 U.S. at p. 604 (1978).)

These cases have resulted in a defendant being permitted to put on virtually anything in mitigation with regard to whether the death penalty is appropriate. In California, for example, it has been held that a defendant's poetry was relevant to establish mitigation in the penalty phase and should have been admitted. (People v. Harris, supra, 36 Cal.3d at pp. 67-71 (plurality opinion.)

In this case, for example, according to the petition of the State of Ohio, the defendant was allowed to call the mother of the victim who, for religious reasons, testified the defendant should not receive the death penalty. (See Petition for Certiorari, pp. 6-7.) However, the Ohio Supreme Court apparently concluded it was improper for the victim's father to respond to this testimony and state the defendant deserved death. This ruling of the Ohio Court was based on Booth. (State v. Huertas 553 N.E.2d 1058 (Ohio 1990).) (Petition for Certiorari, pp. 6-7.)

Allowing the defense to put on unlimited mitigating evidence, but restricting the prosecution as a matter of constitutional law from putting on relevant evidence concerning the victim unfairly tips the scales against the victims and citizens of the community

where the murder occurred. (See Gathers v. South Carolina, supra, ___U.S.____, 104 L.Ed.2d 876, 886-887 (O'Connor, J., dissenting); see too Mills v. Maryland, supra, 486 U.S. 367, 408 (Rehnquist, C.J., dissenting).)

As Justice Scalia noted in his dissent in Booth:

> "To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted. If that penalty is constitutional, as we have repeatedly said it is, it seems to me not remotely unconstitutional to permit both the pros and cons in the particular case to be heard." (Booth v. Maryland, supra, at pp. 520-521.)

Moreover, at this time when victims' rights are receiving much attention, it is illogical to permit

victim-impact evidence to come in with regard to other crimes, but not with regard to the most serious of all crimes, capital murder.[3] (Cf. Booth v. Maryland, supra, at 507, fn 10. ("Facts about the victim and family also may be relevant in a non-capital criminal trial.")

Also if victim-impact evidence is relevant in a non-capital setting as a basis for evaluating moral responsibility, it seems such evidence would be even more important in the singularly important determination of whether the killer should be put to death or allowed to live. This is particularly true when it is considered

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3. California courts have concluded victim-impact evidence is admissible with regard to lesser crimes since Booth only applies to capital cases. (See People v. Sewell 210 Cal.App.3d 1447 (1989), People v. Sanders 221 Cal.App.3d 350 (1990), 361.) California specifically allows the victim and/or his family to address the court in writing and/or orally at the time of sentencing. (Pen. Code, $ 1191.1.)

this evidence is not to be used to evaluate guilt,but to determine whether, within specific guidelines, death is the appropriate punishment.

Booth also should be overruled as the conclusions reached there were so broad that the case has been applied to situations that are far afield from those present in Booth.

Booth involved a detailed, statutorily required Victim Impact Statement which provided the jury with information describing the personal characteristics of the victims and the emotional impact of the crimes on the family. It also set forth the family members' opinions and characterizations of the crimes and the defendant. (Booth v. Maryland, supra, at pp. 502-503.) Booth seemed to rest on the implied holding that evidence that did not bear some relationship to the facts surrounding the

actual offense itself and the offender should not be considered by a trier of fact in determining death.

Indeed, in footnote 10 of the opinion, Booth v. Maryland, supra, at p. 507, this Court noted the disapproval of victim impact statements at the sentencing phase of a capital case did not mean, however, that this type of information would never be relevant in any context. Similar types of information could be admissible because they relate directly to the circumstances of the crime or in cases where the victim's personal characteristics are relevant to rebut an argument offered by the defendant.

However, in South Carolina v. Gathers, supra, at __U.S.___, 104 L.Ed.2d. 876, this Court refused to uphold comments by the prosecutor about the victim of a crime where the comments were based on

admissible evidence the jury had actually heard about the victim and his background.

Thus, the opinion in Gathers seemed to extend the holding in Booth to include discussion of facts based on admissible trial evidence about the victim of the crime. This result is inconsistent with footnote 10 of Booth because the prosecutor's discussion of this admissible evidence certainly involved facts that related directly to the circumstances of the crime.

The holding by the Ohio Supreme Court in this case is even more puzzling and further unduly expands Booth. As noted, according to the state's petition in this case, the father's testimony that Huertas deserved the death penalty was in response to the testimony of the mother, who was put on the stand by the defense, and testified that Huertas did not deserve to die. (Petition, at p. 7.) The

father's testimony was in the nature of rebuttal testimony and should fall within the type of evidence authorized by footnote 10 of Booth. Although it did not relate to personal characteristics of the victim, as suggested by footnote 10, it was in response to an issue injected into the proceedings by the defense,i.e. that one of the victim's parents did not think the defendant deserved the death penalty. Once the defense opened the door on this issue, the state should certainly have been permitted to respond to this issue by showing the father did believe Huertas deserved the death penalty.

The fact the Ohio Supreme Court did not see it this way leads to the conclusion that Booth has left so many questions unanswered that, in spite of footnote 10, the state court felt Booth left it no choice but to reverse the case because of the use of this testimony by

the state. (See State v. Huertas, supra, at p. 1070 (Moyer C.J. concurring.) ("The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in Booth and Gathers differently demonstrates the uncertainty of the law in this area.") (See also South Carolina v. Gathers, supra, at p. ___, 104 L.Ed.2d 876, 884 (O'Connor, J., dissenting.)

Moreover, the remaining testimony from the father and mother went to the direct circumstances surrounding the crime because the defendant had known the family and the victim for some period of time. Thus, whether or not he intended to kill the victim to hurt the family, the fact is he was aware of the potential harm that his conduct could cause to the family under the facts of this case. Accordingly, the victim impact statements were related to the circumstances of the case.

Consequently, the fact the court did not feel footnote 10 applied further suggests that the decision of this Court in Gathers has led to the extension of Booth beyond what was originally intended.

Indeed, a recent decision the California Supreme Court held evidence of the impact of a murder on the victim's family was erroneously admitted, but harmless, even though the victim was killed because the defendant wanted the victim's wife to suffer because of her professional status and professional relationship with the defendant. (People v. Clark, supra, 50 Cal.3d at pp. 612, 629.)

Before this aberrant seedling blossoms into a large tree, it should be plucked. Thus, Booth should be overruled to prevent further expansion of the doctrine that originally had a limited scope.

If Booth is overruled, the testimony bearing on the impact on the victims would be admissible as a circumstance of the crime, particularly since the victims knew Huertas. The opinion of the victim's father that Huertas deserved the death penalty was admissible to rebut defense evidence that the victim's mother held a contrary view.

If this Court declines to overrule Booth, it should be limited so that discussion of evidence bearing on the victim and the circumstances of the crime as in Gathers is admissible. Booth also should be limited so that courts will know that Booth does not preclude prosecution rebuttal to defense victim-impact evidence and does not preclude evidence bearing on the family where the defendant knew the family and must have had some inkling as to the impact on the family his crime would have.

With Booth limited as suggested here, the evidence presented by the state was admissible as it related to circumstances of the offense and was in rebuttal to defense evidence.

Accordingly, it is submitted that Booth v. Maryland should be overruled or limited as it has precluded the trier of fact at the penalty phase of a capital case from considering relevant information relating to the victim and his or her family. "We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." (Gregg v. Georgia, 428 U.S. 153, 205 (1976) (opinion of Stewart, Powell, and Stevens.)

As Justice Blackmun was moved to observe in his dissenting opinion in Furman v. Georgia, 408 U.S. 238, 413-414 (1972):

"It is not without interest, also, to note that

although the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of those opinions makes reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. The arguments for the respective petitioners, particularly the oral arguments, were similarly and curiously devoid of any reference to the victims. There is risk, of course, in a comment such as this, for it opens one to the charge of emphasizing the retributive. (Citation.) Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked. . . ."
(Emphasis added.)

CONCLUSION

Therefore, Booth v. Maryland, supra, should be overruled or limited in scope.

Respectfully submitted,

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of the State of California

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CERTIFICATE OF SERVICE BY MAIL

NO. 89-1944

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OHIO,

Petitioners,

v.

EDIBERTO HUERTAS,

Respondent.

JAY M. BLOOM, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 110 West A Street, Suite 700, San Diego, California, 92101; that on November 9, 1990, he caused to be served a true copy of the attached Brief of the State of California as Amicus Curiae in the above-entitled matter, on counsel for Petitioners and counsel for Respondents by having the same placed in an envelope addressed as follows:

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Said envelopes were then sealed and deposited in the United States mail at San Diego, California, with first class postage thereon fully prepaid.

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1944

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

STATE OF OHIO,
Petitioner,

v.

EDIBERTO HUERTAS,
Respondent.

On Writ of Certiorari to the
Supreme Court of Ohio

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION, FAMILIES AND FRIENDS OF MISSING PERSONS AND VIOLENT CRIME VICTIMS, MARYLAND COALITION AGAINST CRIME, MARYLAND VICTIM ASSISTANCE NETWORK, PARENTS OF MURDERED CHILDREN, PEOPLE AGAINST CHILD ABUSE, AND THE STEPHANIE ROPER COMMITTEE, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE
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Pursuant to Rule 37.4 of the rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of petitioner. Respondent has consented to the filing of this brief. This motion is made necessary by the refusal of petitioner's counsel to provide consent.

Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of its resources to promoting victim rights and criminal justice reform. In 1981, WLF published a "Crime Victims Impact Statement" manual to serve as a model guide for implementation at the state level of the use of victim impact information. WLF works with other victim rights groups, including the *amici* in this case.

Over the last eight years, WLF has also appeared as *amicus curiae* in numerous death penalty cases before this Court and lower federal courts. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Zant v. Stephens*, 462 U.S. 862 (1983); *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987). In particular, WLF, along with other *amici*, a brief in *South Carolina v. Gathers*, 109 S. Ct. 2207 (1989), arguing that *Booth v. Maryland*, 107 S. Ct. 2529 (1987), should be overruled.

Families and Friends of Missing Persons and Violent Crime Victims is a national non-profit organization based in Seattle, Washington, that provides assistance to the families of kidnapped children and victims of other crimes. It is particularly involved with efforts to reform the criminal justice system, and supports the rights of victims to be involved in the capital sentencing process. It has previously appeared as an *amicus* in this Court, most recently along with WLF in *Harmelin v. Michigan*, No. 89-7272.

The Maryland Coalition Against Crime (MCAC) is an organization based in Baltimore, Maryland, that works for enactment of legislation that promotes stronger law enforcement efforts and the rights of crime victims. MCAC currently is seeking adoption of a "Victims' Rights Amendment" to the Maryland Constitution. MCAC has appeared a number of times before this Court

as an *amicus*, including *Pennsylvania Dept. of Public Welfare v. Davenport*, 110 S. Ct. 2126 (1990).

The Maryland Victim Assistance Network (MVAN) is a non-profit organization that provides assistance to the victims of crime. A victim rights advocacy organization, MVAN is made up of law enforcement officers, prosecuting attorneys, community and business leaders, and citizens from across Maryland.

Parents of Murdered Children (POMC), founded by the parents of Lisa Hullinger, who was murdered in 1978, is a national non-profit, self-help support organization based in Cincinnati, Ohio, with chapters nationwide. Besides providing support for grieving parents and family members, POMC provides information about the criminal justice system, and seeks to make that system responsible to the needs of the victim's family. POMC has appeared, along with WLF, as an *amicus* before the Court in several cases, *South Carolina v. Gathers* and *Whitmore v. Arkansas*, 110 S. Ct. 1717 (1990).

People Against Child Abuse (PACA) is the Maryland chapter of the National Committee for the Prevention of Child Abuse. Founded in 1984, PACA has 40,000 members and supporters state-wide. PACA conducts educational programs for both adults and children and and provides legal and material help to victims of child abuse. PACA recently appeared before this Court as an amicus in *Maryland v. Craig*, 110 S. Ct. 3157 (1990).

The Stephanie Roper Committee is a non-profit organization based in Upper Marlboro, Maryland, which was founded in 1982 by Roberta Roper, the mother of Stephanie, who was brutally kidnapped, raped, tortured, and murdered. The Committee is a victim rights advocacy organization which has proposed legislation responsive to the needs of victims. One such proposal enacted into law was the Victim Impact Statement Law which was the subject of the challenge in *Booth v. Maryland*, in which the Committee also appeared as an *amicus*.

All of the above-named *amici* wish to present a broader perspective of the issues in this case in order to assist this Court in its disposition. *Amici* believe that victims should be allowed, as provided by law, to present information to the sentencing authority concerning the impact of the murder upon the victim's family, regardless of whether the case is a capital one or not. Indeed, in a capital case, it is especially important for the victim's family to be able to inform the sentencing authority, whether judge or jury, about the impact that the murder has had on them, and, therefore, on society.

The interests of *amici* are direct and substantial. The participation of the *amici* will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear. In particular, *amici*, unlike petitioner, will focus their brief on the argument that *Booth v. Maryland* and *South Carolina v. Gathers* should not merely be distinguished from the present case, but overruled. Accordingly, *amici* respectively request that their motion for leave to file a brief in support of petitioner be granted.

Respectfully submitted,

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November 15, 1990

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 89-1944

STATE OF OHIO,

Petitioner,

v.

EDIBERTO HUERTAS,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF WASHINGTON LEGAL FOUNDATION, FAMILIES AND FRIENDS OF MISSING PERSONS AND VIOLENT CRIME VICTIMS, MARYLAND COALITION AGAINST CRIME, MARYLAND VICTIM ASSISTANCE NETWORK, PARENTS OF MURDERED CHILDREN, PEOPLE AGAINST CHILD ABUSE, AND THE STEPHANIE ROPER COMMITTEE, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE

The interests of *amici* are fully set forth in the accompanying motion for leave to file this brief.

STATEMENT OF THE CASE

In the interest of brevity, *amici* adopt the statement of the case as presented by petitioner.

SUMMARY OF ARGUMENT

Booth v. Maryland and *South Carolina v. Gathers* represent the ultimate rejection of the role of victims in the criminal justice system. *Booth* and *Gathers* denigrate the humanity of the victims of murder, as well as the suffering of their survivors. These decisions shunted aside important policy considerations that have commanded a larger role for crime victims in bringing criminals to justice.

Booth and *Gathers* are also significant departures from this Court's other death penalty decisions handed down over the past 18 years, and substitute a judicial value judgement against victim participation in place of the adopted policies of state and federal governments favoring such participation. *Booth* and *Gathers* depart so much from the rest of this Court's capital jurisprudence that they are being applied by lower courts in an irregular fashion, sowing confusion and contradiction. *Stare decisis* should not protect decisions which show no deference to the elected branches of government, which casually ignore precedent, and which sow confusion through the lower courts which are charged with applying this Court's decisions. *Booth* and *Gathers* should be overruled.

ARGUMENT

I. *BOOTH V. MARYLAND* AND *SOUTH CAROLINA V. GATHERS* SHOULD BE OVERRULED BECAUSE THEY UNJUSTIFIABLY HINDER VICTIM PARTICIPATION IN THE CRIMINAL JUSTICE SYSTEM.

A. There Is No General Constitutional Impediment to Victim Standing in the Criminal Process.

It is a legal fiction of comparatively recent origin that only the state has an interest in the prosecution of crimes. In England prior to the Nineteenth Century, criminal prosecution was primarily the responsibility of the victim. Public prosecutors were actually more common in the colonies at the time of the American Revolution. Still, private prosecution was accepted in the United States at the time the Eighth Amendment was adopted and for some years thereafter.[1] In light of this history, it would be hard to say that the Framers thought that victim participation in criminal prosecution raised a constitutional doubt. Nor can it be said that the move to public prosecution reflected a desire to eliminate any role for the victim.[2]

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[1] *See* Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 Pepperdine L. Rev. 117, 125-32 (1984); Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J.L. & Pub. Pol'y 357, 359-72 (1986); Benson, *The Last Victim and Other Failures of the Public Law Experiment*, 9 Harv. J.L. & Pub. Pol'y 399, 400-12 (1986).

[2] Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 Law & Contemp. Probs. 225, 245 (1984).

Even today, however, private prosecution of crimes is permitted in a number of states. Although the propriety of allowing a victim to control the prosecution of a crime has been called into question, the point is a debatable one.[3] The existence of a close debate on victim control of prosecution suggests that more limited victim participation in the nature of an impact statement should not be constitutionally questionable.[4]

In fact, victim preferences play an important if informal role in many aspects of the criminal justice system.[5] At the very outset, victims can decide whether to report a crime, and in fact most crimes are not reported. The filing of a formal "complaint" is often required before police will make an arrest for certain crimes. Victims also influence the decision to prosecute

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[3]*Compare* Note, *The Outmoded Concept of Private Prosecution*, 25 Am. U.L. Rev. 754 (1976), *with* Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 Yale L.J. 209 (1955). *See also* Gittler, *supra* note 1, at 150-63; Cardenas, *supra* note 1, at 372-84.

[4]Decisions denying interested parties a role in criminal proceedings reflect descriptive, rather than normative, conclusions. For example, private parties, including victims, have been denied standing to compel enforcement of criminal statutes, but the lack of standing is generally related to the absence of any statute conferring a right to sue. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 Yale L.J. 488 (1988). *See also Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (although standing to challenge nonprosecution was denied for lack of actual or threatened injury, "Congress may enact statutes creating legal rights, the invasion of which creates standing. . . .") *But see Young v. U.S. ex rel Vuitton et Fils*, 107 S. Ct. 2124, 2141 (1987) (Blackmun, J., concurring).

[5]Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 Vand. L. Rev. 931 (1975).

and whether to plea bargain.[6] It has rarely been suggested that it is improper for victim preferences to influence such matters, and any requirement to the contrary would certainly require substantial modifications in our criminal justice system.

Recent years have seen a dramatic trend toward greater formal involvement of victims in the criminal process. Nearly all states and the federal government have adopted victim rights legislation that includes the consideration of victim impact at sentencing. This legislation takes various forms, including the presentation of a formal victim impact statement at sentencing or according the victim a right of "allocution" comparable to the defendant's right to speak before being sentenced.[7] Under *Booth v. Maryland*, 107 S. Ct. 2529 (1987) and *South Carolina v. Gathers*, 109 S. Ct. 2207 (1989), all of this legislation is invalid in capital cases.

Although the states and federal government have made progress in recognizing victims rights, most European countries accord victims greater rights of participation in the criminal process.[8] This aspect of comparative law indicates that victim participation in the criminal process is not an outdated vestige of primitive legal cultures.

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[6]"The prevailing prosecutorial view is that the victim who most vigorously seeks full enforcement of the criminal law is the survivor of the deceased in a homicide case. Local prosecuting officials concede that 'great weight' is given to the victim's desires in serious felony cases, especially homicides." *Id.* at 948.

[7]*See* Gittler, *supra* note 1, at 172-76.

[8] See Hall, *supra* note 5, at 978-80; Cardenas, *supra* note 1, at 383-87; Gittler, *supra* note 1, at 178-81.

B. Victim Participation Serves Important Social Purposes.

From a purely utilitarian perspective, victim participation in the criminal process serves a number of important purposes. This analysis supports our view that *Booth* and *Gathers* were wrong in excluding victim impact evidence in capital cases.

1. Victim Involvement in the System Discourages Vigilantism.

Justice Stewart's concurring opinion in *Furman v. Georgia* contains the following observation: "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy--of self-help, vigilante justice, and lynch law." *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring). These concerns are not fanciful.

The victim rights movement has gained strength in recent years, indicating widespread unrest among victims with the current criminal justice process.[9] Many citizens groups have chosen to provide their own "police force" due to growing skepticism of the State's ability to provide protection. The public often allies itself with citizens who "take the law into their own hands" in response to the inability of the criminal justice system to recognize the community's rights and

[9]Both on the national and local levels, organizations have sprung up across the country to address issues of concern to crime victims and to promote the rights of victims. *See* Carrington and Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 Pepperdine L. Rev. 1 (1984); National Organization for Victims' Assistance, *Victims' Rights and Service. A Legislative Directory* (1987).

needs.[10] All of these facts indicate that society is perhaps reaching the point at which the concept of justice held by the individual, and by the general public, is no longer satisfied by the law.

2. A Right to Victim Participation Encourages Cooperation with Police and Prosecutors.

When victims of crime perceive that the criminal justice system is not vindicating their interests, support for the criminal justice system, which is crucial to the apprehension and conviction of criminals, declines. "Indeed, the conclusion has become nearly inescapable: a criminal justice system that ignores the interests of or ill treats the victim runs the risk of alienating the person upon whom its success as an institution depends."[11]

Crime victims are the major initiators of the criminal process. Approximately 80 percent of crimes are made known to the police through reports of citizens, usually victims.[12] Yet, various statistics indicate that many crimes go unreported.[13] Among the reasons why

[10]The case of Bernard Goetz is instructive. Goetz initially received much public support for his actions. *See* N.Y. Times, Jan. 27, 1985, Sec. 4, at 20, col. 1 (discussing reasons for public support of Goetz).

[11]Hudson, *The Crime Victim and The Criminal Justice System: Time for a Change*, 11 Pepperdine L. Rev. 23, 28 (1984).

[12]Gittler, *supra* note 1, at 147.

[13]Judge Mikva has noted that for every ten crimes committed, an estimated three or four are reported. This figure indicates a "pervading cynicism about the system's capacity to insure justice." Mikva, *Victimless Justice*, 71 J. Crim. L. & Criminology 189, 190 (1981). The Bureau of Justice Statistics, in *U.S. Dep't of Justice*

(continued...)

victims opt not to report crimes is the fear that the system is powerless to help them and might further victimize them.[14] Similarly, crime victims often choose not to cooperate with prosecution of the offender, leading to dismissal of many cases.[15] Non-cooperation is caused by both the administrative problem of lack of information, and by the systemic flaw of failing to take victims' views and interests into account.[16]

Since victims of crime have already suffered, physically and psychologically, it is not surprising that they choose to avoid involvement in the criminal process. Studies addressing victim involvement in the criminal process suggest that there is a high correlation between victims' satisfaction and their perceptions that they influenced the outcome or that the sentencing authority was sensitive to victim issues.[17] These studies confirm that a greater role for victims in the sentencing process may positively impact on the reporting and investigation of crime.

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[13](...continued)
Report to the Nation on Crime and Justice (Oct. 1983), suggests that less than 50% of all violent crimes are ever reported.

[14]Kidd & Cajet, *Why Do Victims Fail to Report? The Psychology of Criminal Victimization*, 40 J. Soc. Issues 34-50 (1984), *cited in* Kilpatrick & Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 21 (1987).

[15]Gittler, *supra* note 1, at 148. *See also* Hudson, *supra* note 111, at 30.

[16]*See* Kelly, *Victims' Perceptions of Criminal Justice*, 11 Pepperdine L. Rev. 15 (1984).

[17]Kilpatrick & Otto, *supra* note 14, at 23-24 (citing J. Herndon & B. Forst, *The Criminal Justice Response to Victim Harm* (1984)).

3. Participation in the Criminal Justice System Helps to Remedy the Traumatic Effects of Crime on the Victim.

Victimization carries with it profound psychological consequences, both immediate and in the long term, and it is often this psychological injury that has the greatest impact on the victim.[18] In addition to crime-related stress caused by feelings of inequity, loss of security, perceived greater vulnerability, and perception of being deviant, crime victims are psychologically affected by the lack of any role in the criminal process. The victim quickly learns that the system's resources "are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands."[19] This realization, combined with the long duration of the capital criminal process, results in a feeling of loss of identity and additional emotional and psychological stress for the victim.[20] Permitting crime victims to participate in the proceedings can eliminate or reduce the potential for further psychological harm by reducing their perception of inequity or helplessness.[21] In particular, participation at the sentencing phase can be a cathartic experience for the victim, which helps bring an end to the psychological suffering that follows victimization.

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[18]Task Force on the Victims of Crime and Violence, *Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 Am. Psych. 107 (1985).

[19]*Id.* at 109.

[20]*Id.*; Gibbons, *Victim Again: Survivors Suffer Through Capital Appeals*, 74 A.B.A. J. 64 (Sept. 1988).

[21]Kilpatrick & Otto, *supra* note 14, at 19.

C. Victim Impact Evidence Counterbalances the Defendant's Trial Strategy of Presenting Mitigating Evidence.

This Court's decisions in *Furman v. Georgia* and its progeny have completely recast this nation's capital jurisprudence. The strategy of a defendant at a capital trial has undergone perhaps the most fundamental change. The impact of these decisions on capital defense strategy has been described as follows:

> In practical terms, . . . the death sentence will be imposed upon "the diminishing few who do not have this [mitigating] evidence (or as much of it) to offer." Penalties in capital cases ultimately will turn on mitigating evidence and on the advocate's ability to marshall and present that evidence. As a matter of law and practice, the opportunity to present almost any arguably mitigating evidence crucially distinguishes death penalty trials from all other criminal trials.[22]

Mitigation evidence has thus become a key part of the defendant's trial strategy. The elements of that strategy have even been articulated for the benefit of defense counsel, the main point being, "try to convey defendant's humanness to the sentencer."[23] An example of the effectiveness of the strategy is provided in the following case:

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[22]Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 48 N.Y.U. L. Rev. 299, 315 (1983) (citations omitted).

[23]*Id.* at 362.

> Bernardino Sierra was mean, big and ugly, and he had done evil and inhuman things. In eight hours, he had committed twelve robberies, two maimings, and three killings. He had terrorized and tortured people. While one of his victims was lying on the ground with his face in a pile of broken glass, Sierra kicked him in the back of the head to drive glass into his eyes. Another victim also lay face down. Sierra raked his shotgun up the spine of this one, then fired into the wooden floor beside his head, exploding wood fragments into his head and neck. The experts said it was the "most likely case for capital punishment perhaps in the history of Harris County."
>
> [At sentencing, Sierra presented evidence that] when he was a little boy, his stepfather would come home drunk at night and beat him with a wire whip, catching him while he was asleep. His stepfather would lock him out of the house at night sometimes, and he would crawl under it to make his miserable bed and try to sleep. Often he was hungry and had no food. He ate out of garbage cans. He brought the best food he found there home for his mother and little sister.
>
> His mother told this to the jury. Then his son, a beautiful little boy, got on the stand and told the jury "That's my father." And the lawyer asked him, "What's the jury going to decide?" "Whether he lives or whether he dies," said the little boy.
>
> The jury spared Sierra's life.[24]

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[24]*Id.* at 300-01 (footnote omitted).

Since capital defendants are given such extreme latitude in presenting mitigation evidence, it is only just to allow some presentation of victim impact evidence at the sentencing phase.[25] It may well be that a court should use its power under the rules of evidence to exclude particular items of victim impact evidence that are uniquely prejudicial. However, the existence of a *per se* rule of exclusion gives the defendant an unwarranted advantage in seeking to appeal to the jury's sympathy.

Part of the concern about admitting victim impact evidence may derive from the belief that each human life must be treated as having equal value. The Court in *Booth* thought it wrong to impose more severe punishment for the death of a person who is wealthier, has more articulate relatives or whose loss evokes a greater sense of grief. *Booth*, 107 S. Ct. at 2534 n.8.

Amici's answer, of course, is that the ideal of equality is never perfectly implemented in the criminal process. Defendants who are wealthier can hire more talented lawyers. More attractive defendants receive more lenient sentences. The law punishes the murder of a police officer or President more seriously than the murder of an ordinary citizen. A requirement of exact equality in the administration of capital punishment would be so unrealistic and unattainable as to deny the state the ability to exact such punishment at all. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1781 (1987).

Amici also question the assumption that considering victim impact evidence will contribute to invidious discrimination on the basis of victim status. The facts of the instant case illustrate that a jury can be persuaded that justice requires the death penalty when the victim is not wealthy or socially prominent. Rather

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[25] *See* American Bar Association, *Guidelines for Fair Treatment of Victims and Witnesses in the Criminal Justice System* 18 (1983).

than emphasizing differences, victim impact evidence conveys our common humanity with those who suffer from crime and keeps us from thinking of them as faceless abstractions. Ralph Harris, Jr., who was so brutally murdered by respondent in this case, was a real and unique person. It is only just that the jury was permitted to understand this truth.

II. *BOOTH* AND *GATHERS* SHOULD ALSO BE OVERRULED BECAUSE THEY ARE UNSOUND IN PRINCIPLE AND UNWORKABLE IN PRACTICE.

A. *Stare Decisis* Should Not Protect *Booth* and *Gathers* from Being Overruled.

As *amici* assert, *see* argument at II.B., *infra*, the decisions in *Booth* and *Gathers* were themselves misinterpretations of this Court's earlier death penalty decisions. In this case, *stare decisis* should not protect erroneous decisions which have themselves ignored precedential decisons.

Stare decisis is a judicially created doctrine that is used by courts to justify their refusal to overrule erroneous decisions. The underlying principle seems to be that stability in the law and the reliance placed upon erroneous decisions are preferable to correcting judicial mistakes. As Justice Brandeis observed, "[I]t is more important that the applicable rule of law be settled than that it be settled right. . . ." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932). This observation is an overstatement since this Court does not blindly adhere to *stare decisis*; otherwise, no decision would ever be reversed.

Stare decisis is a cornerstone of our legal system, but it has less power in constitutional

> cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. We have not refrained from reconsideration of a prior construction of the Constitution that has proved "unsound in principle and unworkable in practice."

Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3056 (1989) (plurality opinion) (citations deleted). *See also United States v. Barnett*, 376 U.S. 681, 699-700 (1964); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Monell v. Dept. of Soc. Serv. of the City of N.Y.*, 436 U.S. 658, 695 (1978).

While it is generally held that *stare decisis* is more important in the context of this Court's statutory interpretation decisions, the fact is that since 1961 alone, this Court has overruled or materially modified statutory precedents more than *80 times*.[26] If *stare decisis* has not blocked this Court from revisiting erroneous holdings in statutory interpretation cases, there remains no good justification for this Court to reverse its earlier mistaken holdings in *Booth* and *Gathers*.[27]

B. *Booth* and *Gathers* Conflict With This Court's Other Death Penalty Decisions.

In essence, *Booth* and *Gathers* represent a court-fashioned rule, under the cloak of the Eighth Amendment, that eliminates "virtually all consideration of the

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[26]Eskridge, *Overruling Statutory Precedents*, 76 Geo. L. J. 1361 (1988).

[27] As recently as a few months ago in *Maryland v. Craig*, 110 S. Ct. 3157 (1990), this Court for all practical purposes overruled its earlier Confrontation Clause decision in *Coy v. Iowa*, 487 U.S. 1012 (1988), illustrating how *stare decisis* is not so binding upon constitutional cases.

victim at the penalty phase" of a capital trial. *Gathers*, 109 S. Ct. at 2212 (O'Connor, J., dissenting).

Booth and *Gathers* depart from even-handedness in sentencing and come down completely on the side of helping killers escape the ultimate penalty. At the time of the two 5-4 decisions, the reasoning of both *Booth* and *Gathers* were sharply attacked in dissent, both for their absence of any real foundation in prior case law, and for their casual dismissal of the overwhelming public consensus in favor of involving victims in the criminal justice system. This criticism is no less resonant today than at the time of those decisions, and society can not abide by a system which places the rights of convicted murderers above those of their victims. If *Booth* and *Gathers* were the only guide, one might believe that the only individual worth considering in a capital case is the defendant. This Court must not allow this practice to continue any longer. As Justice White has said, "[t]he state has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Booth*, 107 S. Ct. at 2540 (White, J., dissenting).

Booth and *Gathers* disregard this Court's mandate that in making the decision between life and death, a capital sentencer make an "individualized determination" that is "based on the character of the individual [defendant] *and the circumstances of the crime*." *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis added).[28]

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[28]The reasoning in *Zant* flows directly from *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976), which rejected mandatory death sentences on the

(continued...)

Since its landmark 1976 decisions on the death penalty, this Court has thwarted *any* state attempt to place *any* limits on the amount or type of mitigating evidence that a capital defendant may introduce at the penalty phase of his trial. *See, e.g. Lockett v. Ohio*, 438 U.S. 586 (1978). Simultaneously, the Court has steadily narrowed the utilization of evidence which may be used by the state in aggravation, such as in *Booth* and *Gathers*.[29] If remote childhood problems of a mass murderer are somehow relevant to the circumstances of his crime, then justice demands that this evidence be rebutted by an exploration of the total harm caused by that criminal's acts. But how can the harm of a defendant's acts be properly explored if the sentencer is barred from hearing any evidence about the victim?

In their haste to bar all evidence of the victim from the sentencing phase of a capital trial, the *Booth* and *Gathers* Courts also misapplied *Enmund v. Florida*, 452 U.S. 782 (1982). Considerations of a defendant's "personal responsibility and moral guilt"[30] are intimately bound up with the characteristics of the victim and the level of harm caused by defendant's crime.[31] Justice

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[28](...continued)
grounds that a mandatory penalty does not allow adequate consideration of the circumstances of the crime or of the murderer.

[29]Justice Scalia rightly castigated this trend in his opinion in *Walton v. Arizona*, 110 S. Ct. 3047, 3058-3068 (1990) (Scalia, J. concurring in part and concurring in the judgement), and *amici* urge this Court follow his lead in discarding the *Woodson-Lockett* line of cases.

[30]*Enmund*, 452 U.S. at 801.

[31]*See Booth*, 107 S. Ct. at 2541 (Scalia, J., dissenting).

Brennan's assertions to the contrary in *Gathers*[32] constitute merely Justice Douglas' famous "gloss,"[33] which this Court should now wipe away from the underlying law.

Indeed, evidence about the victim will not always work in favor of the prosecution. An individual convicted of murdering a drug dealer, for example, could make a reasonable claim in mitigation that his act actually *benefited* society by ridding the community of a merchant of violence and death. At the same time, victim evidence may in some circumstances make a sentencing authority more apt to impose the death penalty. Yet "[t]here is nothing aberrant in a juror's inclination to hold a murderer accountable not only for his internal disposition in committing the crime but also for the *full extent of the harm he caused*." *Booth*, 107 S. Ct. at 2540 (White, J., dissenting) (emphasis added).

The majority opinions in *Booth* and *Gathers* represent no innate constitutional principle of long standing. They employed no concepts from the common law. The decisions were not based upon the statutes or sentencing practices of any state or jurisdiction. Rather, *Booth* and *Gathers* are little more than the subjective value choices of five judges whose personal feelings led them to overrule the laws of dozens of states that command a role for the victim in the capital sentencing process. If a state enacts a law which provides that the full extent of a killer's harm be revealed to the jury at

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[32]*See Gathers*, 109 S. Ct. at 2211, where Justice Brennan's opinion for the Court rejects South Carolina's claim that the victim's personal effects were relevant to the circumstances of the murder.

[33]A judge "remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949).

sentencing, the legislature's determination is deserving of the utmost deference from this Court, and should be upheld. *Cf. Hutto v. Davis*, 454 U.S. 370 (1982).

C. Any *Stare Decisis* Value of *Booth* and *Gathers* Has Been Eviscerated Because These Decisions Are Confusing to Lower Courts and Are Being Applied in a Non-Uniform Manner.

The application of *Booth* and *Gathers* by lower courts illustrates how these decisions are unworkable in practice and that they have infused confusion into appellate review of the capital sentencing process.

The United States Army Court of Military Review was recently confronted by the issue of victim impact evidence in a capital trial when it decided *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990) (*en banc*). In *Murphy*, the defendant was convicted of three counts of premeditated murder in the killings of his young children and his ex-wife. At the sentencing phase of the court-martial, the defendant tried to show how his ex-wife was a bad mother and therefore, she somehow caused the murders herself. In its presentation, the prosecution highlighted, through witness testimony and through closing arguments, the ex-wife's deep religious belief and her love for her children. After considering all the evidence, the panel members of the court-martial sentenced the defendant to death.

On appeal, the defendant argued that *Booth* and *Gathers* barred the prosecution's victim evidence. The Army court affirmed, finding that:

> [T]he appellant, unlike the defendants in *Booth* and *Gathers*, knew his victims intimately. Evidence of the victim's character, when the victim is known by the murderer, permits the sentencing authority to view the crime through the eyes of the murderer, thus providing insight into the state of mind and moral culpability.

Murphy, 30 M.J. at 1062.

The decision in *Murphy* cannot be reconciled with the decision of the Ohio Supreme Court in the present case. Ediberto Huertas -- a close friend of Ralph Harris, Jr. since childhood -- knew his victim as well as James Murphy knew his ex-wife. Yet the Ohio state court vacated Huertas' sentence based on the following reasoning:

> [T]he *Booth* court held that the admission of victim impact evidence in the sentencing phase of a capital jury trial is constitutional error. . . .
>
> In most cases, the mere fact that the killer knows his victim does not make him more or less deserving of the death penalty. . . . In order to bring in victim impact evidence under the "circumstances of the crime" exception to *Booth*, the state must show a connection to the defendant's "personal responsibility and moral guilt."

State v. Huertas, 553 N.E.2d 1058, 1063-64 (Ohio 1990) (citations deleted).

If a federal military court affirms one death sentence based on a reasoning that is diametrically opposed to that of a state supreme court, then the reasoning behind *Booth* and *Gathers* cannot be clear or lucid.[34]

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[34]Many other decisions which have applied *Booth* and *Gathers* have fallen on opposite sides of the coin, showing how difficult it

(continued...)

When the set of facts are similar, as they are in *Huertas* and in *Murphy*, and in applying *Booth* and *Gathers* each court reaches opposite conclusions, then it follows that *Booth* and *Gathers* have injected uncertainty and instability into capital punishment jurisprudence.[35]

The justification behind *Booth* and *Gathers* -- that victim evidence hinders consideration of the circumstances of the crime in making a sentencing decision -- is an indistinct and ambiguous standard. Far superior would be a decision that overrules *Booth* and *Gathers* and allows experienced trial judges to admit victim impact evidence if it is relevant to the consideration of sentence, so long as the defendant has an opportunity to rebut and question this victim impact evidence.

Not only would overruling *Booth* and *Gathers* in this way correct a flaw in this Court's death penalty jurisprudence, it would also show the nation that this Court takes seriously the legitimate interests of the victims of violent crime. For in reaching a decision about the fate of respondent, this Court should never forget that Ralph Harris, Jr. -- stabbed in the gut and

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[34](...continued)
is to apply the artificial distinction between "victim impact evidence" and "evidence of personal responsibility and moral guilt." *Compare Rushing v. Butler*, 868 F.2d 800 (5th Cir. 1989) (vacating death sentence based on *Booth*) *with Bertolotti v. Dugger*, 883 F.2d 1503 (11th Cir. 1989) *and Thompson v. Lynaugh*, 821 F.2d 1080 (5th Cir. 1987) (rejecting challenges to death sentences by distinguishing *Booth*).

[35]In separate opinions in *Huertas*, three justices of the Ohio Supreme Court noted that *Booth* and *Gathers* are unclear and unworkable. *See, Huertas*, 553 N.E.2d at 1070 (Moyer, C.J., concurring); *Huertas*, 553 N.E.2d at 1070-71 (Douglas, J., dissenting); and *Huertas*, 553 N.E.2d at 1071-72 (Resnick, J., dissenting).

left to die by Ediberto Huertas -- is more deserving of this Court's compassion than his killer.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Ohio should be reversed, and this Court's decisions in *Booth v. Maryland* and *South Carolina v. Gathers* should be overruled.

Respectfully submitted,

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November 15, 1990

* *Amici* wish to extend their appreciation to Christopher A. Sterbenz, third-year student at the Washington College of Law of American University, for his assistance in preparation of this brief.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

(7)

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v.

EDIBERTO HUERTAS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question: Whether the admission of "victim impact" evidence in the sentencing phase of a capital trial violates the Eighth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1944

STATE OF OHIO, PETITIONER

v.

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INTEREST OF THE UNITED STATES

In recent years, the United States has joined the States in adopting various measures to make the criminal justice system more responsive and accountable to the victims of crime. The goal that the criminal justice process adequately consider the harm inflicted by criminal activity appears both in federal criminal law generally and more specifically in the capital context in which this case arises.

As part of the effort to "enhance and protect the necessary role of crime victims * * * in the criminal justice process," Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2(b)(2), 96 Stat. 1248-1249, Congress has mandated that the presentence report prepared after conviction for a federal crime contain "information

concerning any harm, including financial, social, psychological, and physical harm done to or loss suffered by any victim of the offense * * *." *Id.* § 3, 96 Stat. 1249 (directing the amendment of Fed. R. Crim. P. 32(c)(2)).[1] Pursuant to his authority under the Victim and Witness Protection Act, the Attorney General has promulgated guidelines to carry out the policies of that Act. Those guidelines direct, *inter alia,* that "federal prosecutors should advocate the interests of victims at the time of sentencing." Department of Justice, *Guidelines for Victim and Witness Assistance,* 48 Fed. Reg. 33,777 (1983). The Sentencing Guidelines developed pursuant to the Sentencing Reform Act of 1984 demonstrate a similar concern, permitting upward adjustment in sentencing based on the vulnerability or status of the victim or on the degree of harm caused by the defendant. See Sentencing Guidelines §§ 3A1.1, 3A1.2; see also 18 U.S.C. 3553(b).

The strong federal interest in permitting consideration of the harm inflicted on victims of crime is also evident in the context of capital sentencing. For example, Fed. R. Crim. P. 32(c)(2) applies in full to prosecutions under the capital sentencing provisions of the Air Piracy Act, 49 U.S.C. 1472-1473. The death penalty is also available under the Anti-Drug Abuse Amendments Act of 1988, 21 U.S.C. 848(e), in the case of certain continuing criminal enterprise drug offenses involving intentional murder. Although that Act mandates that no presentence report should be prepared in the capital sentencing context, 21 U.S.C. 848(j), it permits the sentencer to find an aggravating circumstance where "[t]he victim was particularly vulnerable due to old age, youth, or infirmity." 21 U.S.C. 848(n)(9). The Act also authorizes any other factor aggravating the crime to be presented to the sentencer upon notice to the defendant, thus authorizing federal prosecutors to present victim impact evidence where appropriate. 21 U.S.C. 848(h)(1)(B) and 848(n).[2] The Court's resolution of this case may directly affect the validity of those provisions of federal law, and it will certainly affect the future development of federal law concerning the use of victim impact evidence at a capital sentencing hearing.[3]

[1] As amended, Fed. R. Crim. P. 32(c)(2)(D) requires that a presentence report include "verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed."

STATEMENT

1. Respondent knew Elba Ortiz and Ralph Harris from the time they attended high school together in Lorain, Ohio. Although respondent and Ortiz never married, they had two children. At some point, respondent ended his relationship with Ortiz and entered into a com-

[2] There are currently two capital cases under 21 U.S.C. 848 pending in the Northern District of Illinois. The use of victim impact evidence has also been at issue in a capital proceeding under the Uniform Code of Military Justice. *United States* v. *Murphy,* 30 M.J. 1040 (A.C.M.R. 1990).

[3] Recent legislative efforts demonstrate a continuing interest in the use of victim impact evidence in this context. For example, the President's crime bill in the 101st Congress included as aggravating factors in capital cases the victim's vulnerability "due to old age, youth, or infirmity," and the victim's employment in certain official capacities. S. 1225, 101st Cong., 1st Sess. § 202 (1989). Another crime bill, passed by the Senate, contained a provision requiring that a victim impact statement be prepared and that such a statement "shall be considered by the court or jury" at the penalty phase of a capital proceeding. S. 1970, 101st Cong., 1st Sess. § 3593(g) (1989). The viability of such measures, and the future development of legislative approaches to the issue, will almost certainly be affected by the Court's decision in this case.

mon law marriage with another woman. He later resumed the relationship with Ortiz and separated from his wife. During early 1986, respondent lived with Ortiz intermittently. Harris, who was a sergeant in the United States Air Force, began dating Ortiz in May 1986. Respondent told Harris to stop dating Ortiz and threatened to "waste him" if Harris continued to see her. Pet. App. 2-4; Pet. 3-4.

On June 6, 1986, respondent drank beer and smoked marijuana after work. That night, respondent and his roommate visited several bars in Lorain. Respondent claimed to have consumed 6 to 19 beers, 6 to 10 shots of rum, and ¼ to ½ gram of cocaine during the course of the evening; his roommate estimated that they also smoked 5 or 6 marijuana cigarettes. Respondent telephoned Ortiz and asked if he could come to her apartment. She refused and told respondent that Harris was spending the night with her. At about 3 a.m. on June 7, respondent broke into Ortiz's apartment. Harris confronted respondent in the hallway, where respondent stabbed Harris. Respondent then attempted unsuccessfully to enter Ortiz's bedroom. After respondent left the apartment, Ortiz took Harris to a hospital emergency room. Harris was able to give a statement to the police, but he died from his wounds later in the day. Pet. App. 4-8.

2. At his trial, respondent testified that he did not intend to kill anyone, that he was intoxicated at the time of the stabbing, and that he could not remember the event. Respondent was convicted of aggravated murder with prior calculation and design, aggravated murder in the course of an aggravated burglary, and aggravated burglary. Respondent was sentenced to death. Pet. App. 4-8.

During the sentencing phase of the trial, the court admitted into evidence a presentence investigation report, prepared at respondent's request, that contained a summary of an interview with the victim's parents. Both

parents also testified as rebuttal witnesses for the prosecution at the sentencing hearing. The evidence from the parents was offered to show the effect of respondent's act on the surviving victims of the crime. Pet. App. 10-11.

3. The Ohio Court of Appeals affirmed the convictions and the death sentence. Pet. App. 63-115. The court held that admission of the victim impact evidence was error, but that respondent was not prejudiced because the presentence report contained only two paragraphs of victim impact evidence and included some statements that were helpful to respondent. Pet. App. 76-78.

4. The Ohio Supreme Court affirmed respondent's convictions but vacated his death sentence. Pet. App. 1-62. Relying on this Court's decisions in *Booth* v. *Maryland*, 482 U.S. 496 (1987), and *South Carolina* v. *Gathers*, 109 S. Ct. 2207 (1989), the court held that "the introduction of victim impact evidence in the penalty phase of a capital trial is constitutionally impermissible." Pet. App. 12.

The court rejected four arguments advanced by the State to distinguish this case from *Booth*. First, the court agreed with the State that the Ohio jury's sentencing recommendation, unlike the Maryland jury's determination in *Booth*, is not binding on the trial court. But in *Gathers*, the court pointed out, this Court applied the rule of *Booth* to South Carolina's sentencing process, which is an advisory process like that of Ohio. Pet. App. 15.

Second, the court refused to distinguish *Booth* and *Gathers* on the ground that the victim impact evidence in this case did not play a significant role in the sentencing process. Although the court acknowledged that the victim impact evidence in *Booth* was more extensive than the evidence in this case, the court concluded that "Mrs. Harris's grief-stricken, emotional testimony is compelling even in a

cold transcript; it is almost impossible to believe that a jury could hear it and remain unaffected." Pet. App. 17.

Third, the court rejected the argument that the victim impact testimony was admissible to rebut respondent's effort to show at the sentencing hearing that he was basically a good person who had acted under the influence of drugs and alcohol. The court observed that the victim impact testimony was not relevant to respondent's character or drug problems, and so was not proper rebuttal testimony. Pet. App. 18.

Fourth, the court was unpersuaded by the State's argument that, because respondent was well acquainted with the victim and his family, the victim impact evidence fell within an exception to the *Booth* rule for evidence that "relate[s] directly to the circumstances of the crime." 482 U.S. at 507 n.10. The court held that under *Booth* the extent of the murderer's knowledge about the victim has no bearing on the murderer's moral guilt unless the murderer acted with the motive to harm the victim's family. Pet. App. 19-20, 60 & n.4.[4]

In a concurring opinion, Chief Justice Moyer agreed with the majority that this Court's decisions in *Booth* and *Gathers* required that respondent's death sentence be vacated. He added, however, that in his view this Court should reconsider *Booth* and *Gathers* and provide additional direction to the lower courts with respect to the treatment of victim impact evidence in capital sentencing proceedings. Pet. App. 45-47.

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[4] The court also held that it was improper for family members to offer their opinions as to the appropriate sentence, as Harris's father had done in this case. Such opinions, the court held, "undermine the defendant's right to trial by an impartial court" and could make the sentencing determination turn on the family's general views about capital punishment. Pet. App. 22.

Justices Douglas and Resnick each wrote dissenting opinions. Justice Douglas took the position that *Booth* bars victim impact evidence only where there is "a substantial risk that the sentencing decision will be based upon arbitrary or irrelevant consideration[s]," and that there was no such risk in this case. Pet. App. 49-50. Justice Douglas also concluded that even if the admission of the victim impact evidence was error, the error was harmless beyond a reasonable doubt.

In her separate dissenting opinion, Justice Resnick urged that this Court reconsider *Booth* and *Gathers*. Based on her view that the sentencing body cannot make "[a]n appropriate, fair and just determination," Pet. App. 58, unless it is permitted to know "all the facts surrounding both the defendant and the victim," Pet. App. 56, she concluded that the admission of the victim impact statement in this case was not prejudicial error. Pet. App. 58.

SUMMARY OF ARGUMENT

1. This Court's decisions in *Booth* and *Gathers* are grounded in the proposition that the full extent of the harm caused by a murderer has no bearing on the extent of the defendant's personal responsibility for the crime. This proposition is not only contrary to traditional approaches to criminal sentencing, but it improperly intrudes into the considered (and contrary) judgment of legislative bodies as to the appropriate range of considerations to be taken into account by the sentencing authority.

The full consequences of a defendant's acts are relevant to capital cases as well as to cases involving other forms of punishment. The Court so held in *Tison* v. *Arizona*, 481 U.S. 137 (1987), where the Court made clear that in certain circumstances, a defendant may be subject to the death penalty because of the consequences of the actions

of another person, even though the defendant does not specifically intend those consequences. More generally, the harm caused by a criminal act has always been regarded as relevant to the question of punishment, even in capital cases. That is, a murder may be distinguishable from an attempted murder by nothing more than poor aim on the part of the defendant, but the fact that the victim dies is highly relevant to the availability of the death penalty as punishment for the crime. Thus, notwithstanding its obvious sensitivity, nothing about the capital sentencing context makes it constitutionally impermissible to identify the consequences of the defendant's acts as bearing on the appropriateness of imposing the penalty of death.

The undeniable fact that victim impact evidence may in some cases include improper or inflammatory evidence does not justify *Booth*'s *per se* rule excluding all victim impact evidence from capital sentencing proceedings. If particular evidence is inflammatory or otherwise unfairly prejudicial, the trial court can and should exclude it. If evidence is improperly admitted, its admission can be fully and carefully reviewed on appeal and a death sentence that is determined to have been imposed on the basis of improper evidence can be vacated. These are not novel suggestions, but rather familiar tasks for trial and appellate courts to perform under applicable rules of evidence. The risk that admitting evidence of the consequences of a defendant's conduct may in some cases result in the admission of improper evidence is scarcely a reason for erecting a *constitutional* rule barring any evidence relating to the effect that a defendant's conduct has had on the persons who have been left behind.

Booth's rigid rule is in severe tension with the principle that a sentencer cannot be precluded from considering any aspect of the defendant's character or record that may

provide a basis for imposing a sentence other than death. If the jury must consider the defendant as a "uniquely individual human being[ ]," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion), then there is no convincing reason—at least none grounded in the Constitution—to prevent the jury from also considering the unique characteristics or circumstances of the victim. Indeed, this Court has already recognized that the victim's status can properly be considered in some settings as a factor weighing in favor of imposing the death penalty. See *Roberts* v. *Louisiana*, 431 U.S. 633, 636 (1977) (victim's status as a law enforcement officer may be considered as an aggravating factor).

2. Principles of *stare decisis* do not preclude reexamination of *Booth*. Although *stare decisis* serves important purposes, it is a flexible policy, not an inflexible rule. The Court's willingness to reconsider its prior decisions is, quite appropriately, greater in constitutional than in statutory cases, for in that setting there is no other method of correcting errors short of constitutional amendment. Moreover, the Court has expressly stated that a prior decision is more likely to be overruled if it has bred confusion or anomalous results, or if it disserves principles of democratic self-governance. Both of these factors weigh heavily in favor of abandoning *Booth*. For each of these reasons, we are firmly persuaded that the case presents one of those rare instances in which a recent decision of this Court should be reexamined and overruled.

ARGUMENT

I. THE EIGHTH AMENDMENT DOES NOT IMPOSE A *PER SE* RULE AGAINST THE ADMISSION OF VICTIM IMPACT EVIDENCE AT THE SENTENCING PHASE OF A CAPITAL TRIAL

In *Booth* v. *Maryland,* 482 U.S. 496 (1987), this Court held that the Eighth Amendment prohibits a jury from considering a victim impact statement at the sentencing phase of a capital murder trial. Two years later, in *South Carolina* v. *Gathers,* 109 S. Ct. 2207 (1989), the Court applied that rule and held that it was error for the prosecutor to comment to the sentencing jury on the personal qualities of the victim. In both cases, the Court made it clear that the admissibility of victim impact evidence was not to be determined on a case-by-case basis, but that such evidence was *per se* inadmissible in the sentencing phase of a capital case except, perhaps, to the extent that it "relate[d] directly to the circumstances of the crime." *Booth,* 482 U.S. at 507 n.10; *Gathers,* 109 S. Ct. at 2211.

This case presents an opportunity to reexamine the *per se* rule announced in *Booth* and applied in *Gathers.* In our view, the Eighth Amendment does not foreclose Congress or a State from deciding that the harm caused by a defendant is relevant to his punishment. Nor can we discern in the Eighth Amendment any basis for judicially foreclosing the use of victim impact evidence to demonstrate the harm caused by a murderer to the victim's relatives and loved ones and to society in general. Accordingly, *Booth*'s interposition of a *per se* rule against the admission of such evidence lacks an adequate foundation in the Constitution.

1. The *Booth* majority began its analysis with the observation that the Constitution requires the jury to make an individualized determination as to whether a

defendant should be executed based on "the character of the individual and the circumstances of the crime." 482 U.S. at 502 (quoting *Zant* v. *Stephens,* 462 U.S. 862, 879 (1983)). The majority conceded that no prior decision of this Court had mandated that only the defendant's character and the immediate circumstances of the crime may constitutionally be considered in a capital sentencing proceeding. But the Court concluded that other factors are irrelevant to the capital sentencing decision unless they have "some bearing on the defendant's 'personal responsibility and moral guilt.' " 482 U.S. at 502 (quoting *Enmund* v. *Florida,* 458 U.S. 782, 801 (1982)). The Court viewed the character of the victim and the effect of the killing as having nothing to do with "the blameworthiness of a particular defendant." 482 U.S. at 504. The Court therefore held that, except in narrowly defined circumstances, the prosecution may not introduce evidence on those issues at a capital sentencing hearing.[5]

The basic fallacy in *Booth*'s reasoning is the conclusion that the harm caused by a murderer does not, and constitutionally may not, bear on the appropriateness of capital punishment. As the dissenting opinions in *Booth* and *Gathers* noted, the criminal law has long embraced the principle that a defendant may be held personally responsible for the harm caused by his actions, and that he may be punished even for unintended consequences of those actions. *Booth,* 482 U.S. at 516 (opinion of White, J.); *id.* at 519 (opinion of Scalia, J.); *Gathers,* 109 S. Ct. at 2214 (opinion of O'Connor, J); *id.* at 2217 (opinion of Scalia, J.).

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[5] *Booth* suggested that victim impact evidence may be admissible if it relates "directly to the circumstances of the crime." The Court also acknowledged that "[f]acts about the victim and family also may be relevant in a noncapital criminal trial." 482 U.S. at 507 n.10.

The correspondence between the harm caused by a bad act and the punishment imposed for the act applies in the context of capital sentencing as well. For example, this Court has forbidden the imposition of capital punishment for certain crimes less grave than murder, see *Coker* v. *Georgia,* 433 U.S. 584 (1977) (rape of an adult woman); *Enmund* v. *Florida,* 458 U.S. 782, 797 (1982) (armed robbery), because those crimes do not possess the special degree of "injury to the person and to the public," *Coker,* 433 U.S. at 598 (opinion of White, J.), that is present when the defendant's conduct results in the taking of a human life.

In upholding the death penalty's application to certain felony murder prosecutions, the Court has made clear that a State may constitutionally make the death penalty turn on the consequences of a defendant's actions—even unintended consequences. Thus, in *Tison* v. *Arizona,* 481 U.S. 137 (1987), the Court held that a defendant who acts with reckless disregard for human life may be subject to the death penalty based on his participation in a robbery, if the robbery results in death. But the Constitution would not, in the Court's view, permit imposition of the death penalty on the same defendant, acting in exactly the same way, with equal recklessness as to human life, if the dangerous felony in which he participated did not result in the death of one of the victims. See *Tison,* 481 U.S. at 148 (death penalty "plainly excessive" for armed robbery unaccompanied by a homicide). The impact on the victim plainly makes the difference as to whether the same act may or may not lead to a sentence of death.

Likewise, even though the death penalty may not be imposed for the rape of an adult woman, see *Coker* v. *Georgia, supra,* the case is dramatically changed if the victim dies as a result of injuries suffered during the rape. In that event, even if the defendant did not specifically intend

to kill the victim, the defendant would be subject in most jurisdictions to prosecution for felony murder and, in light of *Tison*'s analysis, could constitutionally be sentenced to death.

If it is true, as this Court's cases indicate, that the consequences of a crime to the immediate victim are highly relevant to punishment, then it is difficult to understand why the Constitution prohibits Congress or a State from attaching weight to the effects that a murder may have on the surviving members of the victim's family. Legislative bodies can reasonably conclude—with the most powerful moral justification—that survivors and loved ones are themselves very much "victims" of the crime of murder.[6] The reality of this point is underscored in case after case coming before this Court. *Booth* itself demonstrates the profound suffering by family members occasioned by the brutal murder of an elderly, defenseless couple.

Less dramatically, the fact that a would-be murderer escapes the death penalty because he is a bad shot and only wounds his victim, or because his victim obtains prompt medical attention and survives, does not render it arbitrary to impose the death penalty on a defendant who, with precisely the same mental state, succeeds in his effort. Similarly there should be no constitutional bar to considering the effects that a defendant's act of murder has on the public and the members of the victim's family, even if that means that another defendant may escape the death penalty because the loss of the victim in his case is not as deeply or as widely felt.

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[6] The *Guidelines for Victim and Witness Assistance* promulgated by the United States Department of Justice provide that "[t]he term 'victim' also includes the immediate family of a minor or a homicide victim." 48 Fed. Reg. 33,775.

2. Although *Booth* held that the "full range of foreseeable consequences of a defendant's actions," 482 U.S. at 504, is not relevant "in the unique circumstance of a capital sentencing proceeding," the reasoning that led the Court to that conclusion was based mainly on its concern that the admission of victim impact evidence would "create[ ] an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." *Id.* at 505. Thus, the Court concluded that admitting victim impact evidence would result in the imposition of capital punishment based on the ability of the victim's relatives to sway the jury or the fortuity that the victim was a "sterling member of the community." *Id.* at 505-506.

In our view, the concerns identified by the Court in *Booth* do not justify a *per se* rule excluding victim impact evidence in capital sentencing proceedings without further inquiry into the nature of the evidence in question. It cannot be denied, as the Court noted in *Booth*, 482 U.S. at 505, that some family members are more articulate than others, and that some are more willing than others to express their grief to a jury. But such differences in personality and background constitute an inescapable feature of a criminal justice system in which the participants are individual human beings of widely differing backgrounds, abilities, and experiences. To state the obvious, all witnesses, including witnesses for the defense, differ in their ability to present their testimony in an effective and persuasive manner, just as defense lawyers and prosecutors differ in their ability to present evidence and argument to the jury. There is nothing so distinctive about victim impact testimony as to raise these ordinary and unavoidable variations to the level of a constitutional infirmity, and to require exclusion of an entire category of evidence that legislative bodies have determined to be proper and appropriate.

Of course, a capital sentencing decision may not be based on constitutionally impermissible factors such as the race of the victim. See *McCleskey* v. *Kemp,* 481 U.S. 279 (1987). But the risk that juries may base their decisions on such impermissible factors is present regardless of whether victim impact evidence is admitted, and it is by no means clear that introduction of victim impact evidence will have the effect of increasing that risk; indeed, such evidence may have the opposite effect.[7] In any event, the risk that the jury might occasionally misuse particular evidence is more appropriately addressed on a case-by-case basis; it does not justify a *per se* rule, grounded in the higher law of the Constitution, that victim impact evidence may never be admitted at a capital sentencing hearing.

At the same time, *Booth* surely was correct in observing, 482 U.S. at 508, that testimony by members of the victim's family, like other forms of emotionally charged evidence, may in some cases so inflame the jury as to create an unacceptable risk that a death sentence was imposed for arbitrary and capricious reasons. But that possibility does not justify a prophylactic, constitutionally based rule, especially in the face of considered legislative judgments to the contrary. Trial courts routinely exclude evidence if it has an undue tendency to inflame the jury. And—in an extreme case—if the admission of prejudicial matter has resulted in a fundamentally unfair sentencing proceeding, the defendant may be constitutionally entitled to vacation of sentence on that ground. Cf. *Lisenba* v. *California*, 314 U.S. 219, 228-229 (1941). Nor is the promise of reliability

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[7] The evidence may personalize the victim for the jurors and make it more likely that they will empathize with the family members of a victim with whom the jurors might otherwise feel that they have very little in common.

in sentencing proceedings an empty one; this Court "has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings* v. *Oklahoma,* 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). In view of those protections, claims that victim impact evidence was so emotionally charged as to invalidate the jury's sentencing decision should be resolved on a case-by-case basis.[8]

3. The rule in *Booth,* if vigorously applied, would require that all information about the victim's character be omitted from the jury's capital sentencing deliberations. But the Court's prior decisions have never suggested such an extreme result. In *Roberts* v. *Louisiana,* 431 U.S. 633, 636 (1977), for example, the Court stated that "the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circum-

[8] Part of the evidence complained of in this case was an opinion by the victim's father that respondent should receive the death penalty. Such evidence appears to go beyond showing the effects of the crime on the surviving victims and therefore ordinarily should not be admitted as a form of victim impact evidence. But admission of that evidence does not require affirmance of the ruling below. The Ohio Supreme Court clearly decided this case as it did because it regarded itself bound by the broad prohibition on victim impact evidence set forth in *Booth.* If this Court removes that prohibition by overruling or limiting *Booth,* the Ohio Supreme Court will be free to consider the narrower question of the propriety and effect of the father's opinion evidence. We therefore suggest that the Court remand this case to the Supreme Court of Ohio to permit the state courts to determine in the first instance whether the opinion evidence from the victim's father requires reversal of the death sentence in this case. That course is similar to the one suggested by Justice O'Connor in her dissent in *Gathers.* See 109 S. Ct. at 2216 (O'Connor, J., dissenting).

stance." [9] Although it is no doubt possible to distinguish on a case-by-case basis between a victim's status as a law enforcement officer and other facts about the victim, such as that he was the parent of minor children, it is hard to find any constitutional basis for such distinctions, and the process of defining what is constitutionally permissible therefore is bound to be unstable and to create intractable line-drawing problems. Cf. Packer, *Making the Punishment Fit the Crime,* 77 Harv. L. Rev. 1071, 1078 n.21 (1964) ("Description, even approval, of the prevailing mood of penal philosophy * * * is one thing; its elevation to constitutional dogma is quite another.").

In addition, this Court has held that the Constitution requires that "the sentencer * * * [cannot] be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion). See also *Skipper* v. *South Carolina,* 476 U.S. 1 (1986); *Eddings* v. *Oklahoma,* 455 U.S. 104 (1982). That principle is, of course, consistent with the need for a thorough and searching inquiry when the sentencer must decide a question of life or death. When combined with the rule of *Booth* and *Gathers,* however, that principle creates an anomaly. The sentencer is required to consider the full range of facts about the defendant's character and circumstances, but may not be told anything of the character of the victim or the extent of the harm the defendant has inflicted upon others.

[9] Federal statutes authorize the death penalty for the assassination of the President or Vice President, 18 U.S.C. 1751, 1111, a Member of Congress, Cabinet officer, Supreme Court Justice, or the head of an Executive Department, 18 U.S.C. 351.

We can discern nothing in the Constitution that requires such a one-sided presentation. As Justice Cardozo wrote for the Court, "[J]ustice, though due to the accused, is due to the accuser also. * * * We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934). If a sentencing jury is to "express the conscience of the community on the ultimate question of life or death," *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968) (footnote omitted), there should be no constitutional prohibition against permitting the jury to have a complete picture of the act the defendant has committed and all of those whose lives have been affected so profoundly by that act.[10]

II. PRINCIPLES OF *STARE DECISIS* DO NOT REQUIRE CONTINUED ADHERENCE TO *BOOTH* AND *GATHERS*

The doctrine of *stare decisis* serves important purposes in our legal system. The doctrine promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. See *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986). But the Court has recognized that "*stare decisis* is a principle of policy and not a mechanical for-

[10] The imbalance that results from the rule announced in *Booth* is plain upon examination of the range of mitigating evidence that courts are constitutionally required to admit in capital sentencing proceedings. See, *e.g.*, *State* v. *Bean*, 137 Ill. 2d 65, 560 N.E.2d 258 (1990) (witnesses testified about "tempestuous atmosphere of defendant's childhood home; they related, among other things, that defendant's father, who drank, died when defendant was 12 years old, causing his mother to work two jobs and preventing her from closely supervising him"); Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 300-301 (1983) (describing sentencing hearing in which defendant's son testified).

mula of adherence to the latest decision." *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940). And it is well settled that *stare decisis* is less inflexible in constitutional cases than in statutory cases, because in the former cases "correction through legislative action is practically impossible." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting). See also *Monell* v. *Department of Social Services*, 436 U.S. 658, 696 (1978).

Although the Court has not adopted a "rigid formula" for deciding when a prior construction of the Constitution should be overruled, *Vasquez*, 474 U.S. at 266, it has identified several factors that bear on that determination. One question is whether the prior rule has bred confusion or led to anomalous results. *Solorio* v. *United States*, 483 U.S. 435, 448-450 (1987); *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 74-78 (1938). Another is whether a prior decision, even one of fairly recent vintage, "disserves principles of democratic self-governance." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985). Both of these factors, in our view, point strongly toward reconsideration of *Booth* and *Gathers*.

There is no question that *Booth* has spawned confusion and uncertainty in the lower courts. See *Gathers*, 109 S. Ct. at 2212 (O'Connor, J., dissenting) (citing cases); *Mills* v. *Maryland*, 486 U.S. 367, 395-398 (1988) (Rehnquist, C.J., dissenting). Indeed, in this very case, Chief Justice Moyer noted in his concurrence that the fact that the majority and the two dissenters all interpreted *Booth* and *Gathers* differently vividly demonstrates the uncertainty of the law. Pet. App. 45-46.

Although the *Booth* Court painted with a broad brush, questions linger as to whether *Booth* outlaws admission of *any* statements or evidence relating to the character of the victim or the impact of the crime, or whether *Booth*'s pro-

hibition applies only to evidence that resembles the formal victim impact statement at issue in that case. An even more difficult question is whether, and if so what, victim characteristics remain legitimate subjects for consideration in sentencing. For, as noted above, the Court has stated that certain victim characteristics, such as the victim's status as a police officer, may appropriately be made an aggravating circumstance, see *Roberts* v. *Louisiana, supra,* and it appears that *Booth* did not alter that rule. But the co-existence of *Roberts* and *Booth* still leaves open other questions, such as whether the victim's youth, age, or infirmity may be taken into account, see 21 U.S.C. 848(n)(9); whether the defendant must have been aware of those factors in order for them to be taken into account; or even whether the defendant must have acted with intent to exploit those characteristics.

It may be that this Court could reduce the level of uncertainty over time by deciding a series of cases limiting and defining *Booth*'s reach. But because the principles informing *Booth*'s exclusionary approach have no natural limits, the process of enforcing its reach will necessarily have an *ipse dixit* quality to it, rather than constituting a logical extrapolation from principles that the *Booth* majority laid down. In addition, *Booth* will continue to create conflicts with state and federal sentencing practices, by virtue of its being at odds with the generally accepted principle that a criminal may be punished for the consequences of his acts. That principle manifests itself in many ways, each of which presents an occasion for a conflict with the principles informing *Booth*.

More fundamentally, as we have suggested, *Booth* substantially interferes with the traditional responsibility of legislatures to determine which factors shall be relevant in imposing criminal sentences. See *Gore* v. *United States,* 357 U.S. 386, 393 (1958). In recent years, both Congress

and many state legislatures have enacted legislation recognizing and protecting the rights of victims of crime.[11] *Booth* is not only inconsistent with the significant body of victim rights legislation that has emerged in recent years, but it forecloses the opportunity for further development of community values through additional legislation on that subject by Congress and the States. In view of its doctrinal weakness and its interference with the considered judgment of democratic institutions with respect to sentencing, *Booth* should not stand.

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[11] The Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248, requires that presentence reports in most federal cases, including capital prosecutions under the Air Piracy Act, contain victim impact information. In addition, the Court noted in *Booth* that 36 States permit or require the use of victim impact statements in some contexts. 482 U.S. at 509 n.12 (citing National Organization for Victim Assistance, *Victim Rights and Services: A Legislative Directory* 32-33 (1985); McLeod, *Victim Participation at Sentencing,* 22 Crim. L. Bull. 501, 507 & n.22 (1986)). Legislative decisions are foremost among the "objective indicia" of contemporary values to which the Court has looked in its Eighth Amendment cases. See, *e.g., McCleskey,* 481 U.S. at 279; *Gregg* v. *Georgia,* 428 U.S. 153, 175 (1976) (lead opinion).

CONCLUSION

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted.

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NOVEMBER 1990

U.S. GOVERNMENT PRINTING OFFICE: 1990—282-061/20194

AMICUS CURIAE

BRIEF

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Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1944

IN THE

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October Term, 1990

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PETITIONERS,

v.

EDIBERTO HUERTAS,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE STATE OF OHIO

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QUESTION PRESENTED

Should the Court overrule *Booth* v. *Maryland*, 482 U.S. 496 (1987)?

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE STATE OF OHIO

Pursuant to Rule 37.4, Rules of the Supreme Court of the United States, *amicus curiae*, the Appellate Committee of the California District Attorney's Association, including the District Attorney of Los Angeles County, hereby moves for leave of this Court to file the attached *amicus curiae* brief in support of the State of Ohio.

Pursuant to Rule 37.3, Rules of the Supreme Court of the United States, *amicus* sought consent on three separate occasions from petitioner in this case. Petitioner has failed to

respond to our requests that petitioner provide such consent, nor has respondent given consent to file this brief.

The California District Attorneys Association is an association of District Attorneys who are authorized law officers of the State of California and of the counties they represent, including the County of Los Angeles, such counties being political subdivisions of the state. Thus, had the members of this association individually and separately sought to file this brief, consent would not have been required. See Rule 37.5, Rules of the Supreme Court of the United States.

In the event that this Court is not inclined to grant leave to file this brief on behalf of the Association, *amicus* respectfully requests that it be filed on behalf of the District Attorney of Los Angeles County alone under Rule 37.5.

Amicus believes that pursuant to Rule 37.1, Rules of the Supreme Court of the United States, the *amicus* brief offered herein brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties, and will be of considerable help to the Court. The basic premise of petitioner's position in this matter is that the case at bar is distinguishable from this Court's decision in *Booth v. Maryland*, 482 U.S. 496 (1987). *Amicus* offers a very different argument - that *Booth v. Maryland* was improvidently decided and should be overruled. Due to the strong dissents voiced by members of this court in both the *Booth* and *South Carolina v. Gathers*, 109 S.Ct. 2207 (1989) decisions, the *amicus* position certainly brings relevant matter to the attention of the court that would not otherwise be discussed. Hence, it is submitted that the brief of *amicus* will be helpful to this Court.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by an association consisting of the District Attorneys of the State of California and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Los Angeles County. Upon review of the instant matter - which raises the issue of the admissibility of victim impact statements at capital proceedings - the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case shall likely have

substantial impact upon the administration of criminal justice throughout California. It is for this reason that the Committee seeks leave to file the attached *amicus curiae* brief herein.

Respectfully submitted on behalf of the
California District Attorneys
Association, and the District Attorney
of Los Angeles County

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SUMMARY OF ARGUMENT

Amicus files the instant brief in order to urge this Court to overrule its prior decisions in *Booth v. Maryland*, 482 U.S. 496 (1987) and, as a secondary matter, in *South Carolina v. Gathers*, 109 S.Ct. 2207. Since the split votes on those cases suggest that a majority of the Court may believe that *Booth* was incorrectly decided, Section I of the brief focusses upon the reasons that stare decisis should not prevent the Court from overturning that case. Section II is concerned with the substantive reasons that *Booth* was incorrectly decided, but is also intended to show that *Booth* "poses a direct obstacle to the realization of important objectives embodied in other laws" and should therefore be overruled. *Patterson v. McClean Credit Union*, __ U.S.__ [109 S.Ct.2363, 2371, 105 L.Ed.2d 132] (1989).

Although the actual meaning of *Booth* has been the subject of considerable debate and disagreement, it is clear that the case seriously limits the admission of victim impact evidence at the penalty phase of capital cases. It is also clear that the basis of the majority's opinion is its conviction that the harm caused by a murderer may be considered in a death penalty case only insofar as the murderer directly intended to inflict that harm. But even a relatively elementary overview of the common law of homicide shows that defendants have long been held legally accountable for results well beyond their original intent. In fact, common law doctrines of felony murder, depraved heart murder, and murder while intent upon inflicting serious bodily injury, all presuppose such extended responsibility.

Furthermore, contrary to implications by the majority in *Booth*, as a society we hold each other responsible for results far beyond our direct intent in ordinary moral relations. In other words, the principle at stake here is not some arcane notion of death-penalty jurisprudence. We are speaking here of

concepts of responsibility which inform our common moral discourse. *Booth* ignores – or, at least, sells short – those concepts. Perhaps just for this reason, *Booth* has provoked both confusion and a sort of passive resistance among the lower courts.

As such, *Booth* is an aberration in the law, running against the grain of both the common law and the common moral wisdom. Its continued vitality (questionable since the decision was announced) only serves to undermine confidence in the reasonableness of the law, by raising doubts about the consistency and impartiality of this Court's jurisprudence in the highly charged and much-watched area of death penalty litigation. Therefore, both the consistency of the law and its moral persuasion would best be served by overruling *Booth v. Maryland*.

I

THE PRINCIPLES OF STARE DECISIS SHOULD NOT PREVENT THE COURT FROM OVERRULING *BOOTH V. MARYLAND*

There can be no question of the important place of the principle of stare decisis in jurisprudence. It not only has predictive value, but also assures that reasoned principle, rather than personal sympathy, shall guide the law:

> "Stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudence that is not based upon 'an arbitrary discretion.'

Patterson v. McClean Credit Union, __ U.S.__ [109 S.Ct. 2363, 2370, 105 L.Ed.2d 132], quoting from The Federalist, No. 78, p. 490 (H.Lodge ed. 1888) (A. Hamilton).

But "stare decisis is a principle of policy and not a mechanical formula." *Id.* at 2370. To the extent that stare decisis acts to protect a coherent legal tradition or to harmonize the law with moral reasoning, it serves as a sort of guardian of consistency and predictability. But, to the extent that it acts to protect cases which are themselves at odds with that legal tradition, or which undermine sound moral reasoning, enforcement of stare decisis only erodes the values it is intended to foster.

As set forth in Section II, below, *Booth* is an anomaly in the legal tradition, departing from both common law jurisprudence and our ordinary notions of moral responsibility. Overruling it therefore will only support consistency and predictability in this area of law. It is a rare instance in which rejecting stare decisis will foster the values which adherence to precedent ordinarily protects: "public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). This case presents one of those instances.

A

Stare Decisis Is Least Persuasive In Constitutional Cases, Such As The Case At Bar

Stare decisis is least powerful in constitutional cases, where, barring a constitutional amendment, this Court has final responsibility. When this Court rules a practice unconstitutional, the effect of such a ruling is to declare that "the Constitution puts [the issue] beyond the reach of the democratic process." *Webster v. Reproductive Health Services*,

106 L.Ed.2d 410, 437-438 (1989). In light of this great consequence, the Court "ha[s] not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.'" *Id.*

As Justice Powell stated,

> [S]tare decisis has never been thought to stand as an absolute bar to reconsideration of a prior decision, especially with respect to matters of constitutional interpretation. . . . It is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand. . . . [A] constitutional decision of this Court should be always open to discussion when it is supposed to have been founded in error, [so] that [our] judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.

Mitchell v. W.T. Grant Co., 416 U.S. 600, 627-628 (1974) (Powell, J., concurring), quoting from Passenger Cases, 7 How 283, 470, 12 L.Ed 702 (1849) (Taney, C.J.).

Booth v. Maryland should be subject to special scrutiny because it intrudes into two areas with which the courts, on Constitutional grounds, have long been hesitant to interfere. First, the effect of *Booth* is to remove a whole class of evidence from consideration by the jury. At the same time that *Booth* prescribes that the "jury is required to focus on the defendant as a 'uniquely individual human being'" (*Booth*, at 504 quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)), it prevents the jury from hearing evidence of the harm done to

the victim and the victim's family, as "uniquely individual human beings."[1] As such, it skews the evidence presented to the jury by reducing the victim to an abstraction. If the right to a jury trial is truly "fundamental to our system of justice" (*Duncan v. Louisiana*, 391 U.S. 145 (1968)), surely that presupposes a fundamental trust in the jury to weigh both sides, fairly presented. While there are certainly appropriate circumstances for limitations on prejudicial or irrelevant evidence, the Court should be particularly reluctant to censor the evidence so that "one side [is] muted." *Booth*, at 519 (Scalia, J., dissenting). Likewise, the Court should be particularly open to reconsidering a decision which has erroneously limited such a fundamental right of both sides.

Second, decisions regarding the appropriate considerations to be taken into account in sentencing are "peculiarly questions of legislative policy." *Gregg v. Georgia*, 428 U.S. 153, 176 (1976). As Justice White urged in his dissent in *Booth*, "the Court should recognize that '"[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."'" *Booth v. Maryland*, 482 U.S. at 515, quoting *Gregg v. Georgia*, 428 U.S. at 175 [quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)].

Finally, *Booth's* foundation in the Eighth Amendment is questionable at best. That the admission of evidence such as *Booth* forbids finds no prohibition in the historical bases of the "Cruel and Unusual Punishments" clause need not be belabored. Nor is that fact alone offered, in any sense, as a reason that

---

1. It should be noted that the majority in *Booth* never offers appropriate authority for the proposition that the jury's attention should focus *entirely* on the defendant. Certainly neither of the cases cited by the majority in that portion of the opinion -- *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), nor *Woodson v. North Carolina* -- stand for that proposition.

Booth is incorrectly decided. As the Court correctly observed in *Furman v. Georgia*, 408 L.Ed. 238, 265:

> Had this "historical" interpretation of the Cruel and Unusual Punishments Clause prevailed, the Clause would have been effectively read out of the Bill of Rights.

It does not follow from this, however, that the members of this Court are therefore free to discover in that Clause their own personal moral convictions, no matter how profoundly held. Such an approach would just as effectively "read into the Bill of Rights" the sort of "arbitrary discretion" which works to undermine judicial authority. As the Court also emphasized in *Furman v. Georgia*:

> We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked.

Id. at 267-268, quoting *Weems v. United States*, 217 U.S. 349, 378 (1910).

But if legal duty rather than personal conscience is at issue in discovering the contemporary meaning of the Constitutional prohibition against "cruel and unusual punishments" then the place to look for that duty ought to be in contemporary moral and legal values, as established and tested in the common law tradition. But it is precisely upon these grounds that *Booth* most obviously founders. Certainly, *Booth* can find little support in contemporary concerns in this area of law. The vast

majority of states, as well as the federal government, have adopted victim's rights legislation, providing for the consideration of the impact of crime upon victims at the time of sentencing.[2] As a recent law review comment noted:

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2. See, Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1242; Alaska Stat. § 12.55.022 (Supp. 1988); Ariz. Rev. Stat. Ann. §§ 12-253(4), 13-702(D)(9) (Supp. 1987); Cal. Penal Code §§ 1191.1 & 1203(h) (Supp. 1988); Col. Rev. Stat. § 16-11-102 (1986); Conn. Gen. Stat. Ann. § 54-91 (1985); Del. Code Ann. Title 11 §§ 4331(d) & (e) (1987); Fla. Stat. Ann. § 921.143 (1985); O.C.G.A. §§ 17-10-1.1, 1.2 (1985); Id. Code § 19-5306 (1985); Il. Stat. Ann. §§ 38-1406, 1005-4-1(6) (Supp. 1988); Ind. Code Ann. §§ 35-38-2-8 & 9 (1985 & Supp. 1988); Iowa Code Ann. § 901.3 (Supp. 1988); Kan. Stat. Ann. § 21-4604(2) (Supp. 1987); Ky. Rev. Stat. §§ 421.500(5)(b), 421.520 (1985); La. Rev. Stat. § 46:1844(9) (Supp. 1986); Me. Rev. Stat. Ann. Title 17-A § 1257 (Supp. 1988); Md. Code Ann. art. 41 § 4-609 (1987); Mass. Ann. Laws ch. 279 § 4B (Supp. 1988); Mich. Stat. Ann. § 28.1287 (763) (764) (765); Minn. Stat. Ann. §§ 609.115, 611A.037 (Supp. 1988); Ms. Code §§ 99-19-151 to 161 (Supp. 1988); Mo. Rev. Stat. § 595.203 (1986); Mont. Code Ann. § 46-18-112 (1987); Neb. Rev. Stat. § 29-2261 (1985); Nev. Rev. Stat. § 176.145 (1987); N.J. Stat. Ann. § 2C:44-6.b (Supp. 1988); N.M. Stat. Ann. § 31-24-5 (1987); N.Y. Crim. Proc. Law § 390.30(3b) (Supp. 1988); N.C. Gen. Stat. §§ 15A-825, 15A-1340.4 (1987); N.D. Cent. Code ch. 12.1-34-02.14 (Supp. 1987); Ohio Rev. Code Ann. § 2947.051 (Supp. 1985); Okla. Stat. Ann. Title 22 § 982 (1986); Or. Rev. Stat. § 144.790(2), (4) (1983); 71 Pa. Stat. § 180-9.3 (Supp. 1987); R.I. Gen. Laws §§ 12-28-4 to 4.3 (Supp. 1986); S.C. Code Ann. § 16-3-1550 (1985); Tenn. Code Ann. §§ 40-35-207(8), 40-35-209 (Supp. 1987); Tx. Stat. Ann. §§ 56.02, 56.03 (Supp. 1988); Vt. Stat. Ann. Title 13 § 7006 (Supp. 1988); Va. Code Ann. § 19.2-299.1 (Supp. 1988); Wash. Rev. Code § 7.69.030 (Supp. 1989); W. Va. Code §§ 61-11A-2 & 3 (1984); Wis. Stat. Ann. § 950.04(2m) (Supp. 1988); Wy. Stat. §§ 7-13-303(a)(iv), 7-13-402 (e)(v) (1987).

> The prevalence of victim impact statements reveals several assumptions about the purposes of punishment. Punishing the defendant according to the degree of harm caused the victim achieves two utilitarian goals: it permits the victim and society to express their outrage at the evil the defendant has cause, and it incrementally deters the underlying criminal conduct. In addition, it is widely believed that achieving the retributive goal of inflicting a "fair" or "deserved" punishment necessitates some considerations of post-crime victim suffering.

Comment, The Significance of Victim Harm: *Booth v. Maryland* and the Philosophy of Punishment in the Supreme Court, 55 CHI. L.REV. 1303, 1304 (1988).

More generally, consideration of the harm done by the crime, both to the victim and to society, is common in sentencing. Nor is this some archaic survival from past ages. For example, in setting the standards for the United States Sentencing Commission in its drafting of the new Federal Sentencing Guidelines, Congress prescribed that the Commission shall consider, among other factors:

> The nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust . . . .

28 U.S.C. 994(c)(3).

Neither (as set forth in Section II, below) does *Booth* find support in the common law tradition generally, or the law of murder, in particular. The majority in *Booth* seems to acknowledge that its view does not reflect common practice in non-capital cases:

> While the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing.

Booth, at 504.

It is certainly true that the death penalty is "a punishment different from all other sanctions." *Booth*, at 509 fn. 12, quoting *Woodson v. North Carolina*, 428 U.S. at 303-304. But that does not explain <u>why</u> consideration of victim impact evidence is appropriate in other cases, but not in the cases involving the death penalty. The problem is that the majority does not explain from legal principles or moral reason, nor set forth convincing authority, such as to justify its departure from past practice. Surely, a generalized "ambivalence" about the death penalty is not sufficient to render whole categories of evidence irrelevant.

In the absence of a reasoned explanation firmly grounded in legal or moral principle, *Booth* only serves to undermine that "public faith in the judiciary as a source of impersonal and reasoned judgments" which underlies the principle of stare decisis. *Moragne v. United States*, 398 U.S. 375, 403 (1970).

B

<u>*Booth* Has Created Confusion Among The Lower Courts</u>

As the Court observed in *Patterson*, a "traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of <u>inherent confusion created by an unworkable decision</u>, . . . or because the decision poses a direct obstacle to

the realization of important objectives embodied in other laws." *Patterson v. McClean Credit Union*, __ U.S.__ [109 S.Ct.2363, 2371, 105 L.Ed.2d 132] [emphasis added].

In speaking of "confusion," as the Court does in *Patterson*, one must, of course, exercise care. Any decision of general application will leave room for divergent interpretation and even spirited disagreement about the meaning of such a decision. But the opinions from the court below, majority, concurring and dissenting, illustrate a much more global confusion engendered by *Booth v. Maryland*.

For its part, the majority of the Ohio Supreme Court found that *Booth* had, as a general matter, "held that the introduction of victim impact evidence in the penalty phase of a capital trial is constitutionally impermissible." *State v. Huertas*, 51 Ohio St.3d 22, 553 N.E.2d 1058, 1062[3] (1990). Citing *Booth*'s language regarding "personal responsibility and moral guilt," the majority strictly limited any admissible evidence to harm actually intended by the defendant and thus had little trouble disposing of petitioner's argument that respondent's knowledge of the victim's family makes such evidence admissible.[4] *Id.* at 1064.

Justice Douglas, in his dissent, vehemently disputes the above interpretation, arguing that "[t]oday's majority opinion does *not* follow *Booth* or *Gathers*." *Id.* at 1071 [emphasis in

3. The majority went on to state that "Victim impact evidence is defined to in *Booth* as including evidence which describes the personal characteristics of the victim, the emotional trauma suffered by the victim's family, or the family members' opinions and characterizations of the defendant and the crime." *Id.* at 1062.

4. In a footnote, the majority therefore allowed that "[i]f the defendant's motive for committing the murder was to inflict emotional trauma on the victim's family, victim impact evidence would be relevant to the defendant's personal responsibility and moral guilt. *Id.* at 1064, fn. 4 [emphasis added].

original]. He concludes that "*Booth* and *Gathers* prohibit the admission of victim impact evidence *only* when that evidence creates a substantial risk that the capital sentencing decision will be based upon arbitrary or irrelevant considerations. . . ." *Id.* at 1071. In other words, *Booth* and its progeny are found essentially to add nothing to what would be excluded by the most innocuous interpretation of the "due process" clause.

Justice Resnick, also dissenting, seems to assume that the majority's interpretation of *Booth* is essentially accurate, but urges that *Booth* be "reconsidered so that when the sentencing authority is making that determination of whether or not to impose the death penalty it will be on an equal footing with the sentencing process in all other criminal cases." *Id.* at 1072. It is worth noting that, although Justice Resnick never considers the effect of the victim impact evidence in the case at bar (concentrating instead on the reasons that it ought to be admissible), she concludes that "[b]ased upon the foregoing I would find that the admission of the victim impact statement was not prejudicial error." *Id.* at 1072. This suggests that *Booth* is being consigned to a "harmless error" analysis, less because of the facts of the case, but because the error is regarded, as it were, as *per se* harmless.[5]

Finally, Justice Moyer, surveying the above in his own concurring opinion, observes, with some understatement, that:

> [T]he fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area.

Id. at 1070.

5. As to which, see also the discussion of California cases, below.

The confusion engendered by *Booth* and its progeny is by no means limited to the Ohio Supreme Court: in amicus' home state of California, the state supreme court has interpreted *Booth* one way, then another, until finally seeming to settle on a course which regards '*Booth* error' as consistently harmless.

In its initial attempts at understanding *Booth*, the California Supreme Court concluded that it restricted only evidence, not argument:

> We note[] that the United States Supreme Court has held formal *evidence* on the impact of a crime on the victim's family to be inadmissible and improper, but that mere *argument*, *without instructions* on the subject, may not be prohibited by *Booth*.

People v. Siripongs, 45 Cal.3d 548, 580, 754 P.2d 1306 (1988) [emphasis in original; citation of *Booth* omitted].

Then this Court decided *South Carolina v. Gathers*, which, of course, focussed precisely upon "mere argument" of victim impact by the prosecutor (as in *Siripongs*) and found such to be prohibited.

Going back to the drawing-board, the California Supreme Court next sought to distinguish *Booth* much along the lines of Justice Douglas' dissent in the case at bar. In *People v. Carrera*, 49 Cal.3d 291, 331, 777 P.2d 121 (1989), the California court addressed testimony by the victim's mother at the penalty phase:

> Although the United States Supreme Court in *Booth v. Maryland* [citation omitted] held evidence of a murder victim's character to be irrelevant to a capital sentencing decision and its admission error, the court did not alter the analysis for the admission of evidence generally or bar the testimony of a victim's relative where that testimony is more probative than prejudicial.

Id. at 331, fn.28.

In subsequent cases, the California Supreme Court has abandoned this interpretation of *Booth*. But after finding, in case after case, that *Booth* had been violated, the court has consistently proceeded to find that the error was harmless beyond a reasonable doubt -- thus honoring *Booth* more in the breach than in the observance. See, *People v. Clark*, 50 Cal.3d 583, 629 (1990); *People v. Gordon*, 50 Cal.3d 1223, 1266-1270 (1990); *People v. Marshall*, 50 Cal.3d 907, 928-929 (1990); *People v. Lewis*, 50 Cal.3d 262, 284-285 (1990); *People v. Douglas*, 50 Cal.3d 468, 536-537 (1990); *People v. Burton*, 48 Cal.3d 843, 868-869 (1989).

II

BOOTH V. MARYLAND WAS IMPROVIDENTLY DECIDED AND SHOULD BE OVERRULED

A

The Common Law Has Always Considered Actual Harm Rather Than Basing Punishment Solely Upon The Defendant's Intent

The Court in *Booth v. Maryland* determined that victim impact evidence is unconstitutionally inadmissible during the penalty phase of a capital proceeding because the information contained therein has nothing to do with the defendant's culpability. Citing to its decision in *Enmund v. Florida*, 458 U.S. 782, 801 (1982), the majority in *Booth* underlined its

position that only that information which bore directly upon the defendant's "personal responsibility and moral guilt" would be admissible at a capital sentencing proceeding. *Booth*, 482 U.S. at 502. The *Booth* court concluded that victim impact statements presented factors which "may be wholly unrelated to the blameworthiness of a particular defendant." *Id.* at. 504.

While the Court in *Booth* hinted that the criminal law may well be willing to consider as relevant the actual foreseeable harm caused by the defendant in "other criminal and civil contexts," it was not willing to "agree that it is relevant in the unique circumstances of a capital sentencing hearing." *Id.* at 504. Although conceding that the Court's decision in *Tison v. Arizona*, 481 U.S. 137 (1987), made capital defendants morally culpable for more than just the harm they specifically intended, it appears the *Booth* Court nevertheless was unwilling to abandon the notion that criminal responsibility should largely remain uninformed by the harm caused. *Booth* at 504.

As one law review author has expressed:

> [T]he most serious flaw in the *Booth* Court's reasoning is its failure to recognize the *eligibility* for the death penalty always depends upon the harm that results. . . . [T]he criminal law categorizes punishments according to actual results. Thus, to reject the degree of harm inflicted as irrelevant, when divorced from the defendant's intentions, is to reject a principle that pervades the criminal justice system.

Comment, The Significance of Victim Harm: *Booth v. Maryland* and the Philosophy of Punishment in the Supreme Court, 55 U. CHI. L. REV. 1301, 1325-26 (1988).

As Justice White emphasized in his dissent in *Booth*, this Court has in other cases "indicate[d] that the harm caused by an offense may be the basis for punishment even if the offender lacked the specific intent to commit the harm. See, e.g., *United States* v. *Feola*, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed 2d 541 (1975) . . . ." *Booth* at 517 n.1. Indeed, the majority in *Booth* recognized that the harm caused to society "may be relevant in other criminal contexts" but not in "the unique circumstance of a capital sentencing hearing." *Booth* at 504. The *Booth* decision appears to make no principled distinction between capital and non-capital cases in the admission of evidence as to the impact of the defendant's actions upon society. While every human life is important and we will punish any one who takes any life unjustifiably, obviously there is a greater impact upon society when a President is killed than when the average citizen is killed. See *Booth* at 517 n.2 (*White, J.*, dissenting).

The criminal law has always incorporated within its theory of moral culpability the concept that a defendant may be held accountable not only for the intention of his act alone but also for the harm he has caused. No where is this more evident than in the common law concepts of murder.

Classically, murder involved but one factual scenario - an individual intended to kill his victim and accomplished that end. Soon, however, English jurists recognized that life could be taken by another in circumstances in which the defendant did not intend to kill but in which his actions were so inherently dangerous to human life, that it was perceived to be unconscionable to fail to hold the defendant responsible for the harm caused to the victim. Consequently, the English jurists developed three new forms of murder in which malice would be implied from the defendant's conduct, and the defendant would be held accountable for the harm he caused to the victim even though he had never specifically intended the death

of that victim. Felony murder, depraved heart murder, and intent-to-do-serious-bodily-injury short of death became new theories of murder. See W.R. LaFave & A. Scott, Criminal Law §§ 7.1, 7.3-7.5 (2d ed. 1986).

With **intent-to-do-serious-bodily-injury murder** a person would be guilty of murder if the death resulted from an act intended to cause great bodily injury. The unintended killing was determined to be sufficiently within the scope of the risk intentionally created by the defendant so as to make him liable for murder even though he had not intended that result. This type of common-law murder became a part of the law of murder in America. *Id.* § 7.3, at p. 616. Just as this form of murder makes a defendant legally culpable for the death of another even when it was not intended, so it is entirely appropriate to hold a defendant accountable for the foreseeable but unintended impact of his murder upon the victim's family and upon the community as a whole.

Similarly, the **depraved heart form of murder** holds a defendant accountable for the killing done with a wanton disregard for the strong likelihood that death or great bodily injury will result from the defendant's conduct although the killing of the victim was not specifically intended by the defendant. Here, again, the defendant is held morally culpable for the result of his conduct and the harm he has caused the victim regardless of the intention of his act. *Id.* § 7.4, at pp. 617-621.

The Court in *Tison v. Arizona*, 481 U.S. 137, recognized that one who acts with a reckless disregard for human life represents a highly culpable mental state that may support a capital sentencing judgment in combination with major participation in the felony resulting death. *Id.* at 157. Although petitioners in *Tison* argued that since they did not themselves intend to kill the hapless family which had stopped by the

wayside to assist petitioners, and should not be held accountable for the victims' deaths, this Court ruled that even though a murder was not specifically intended by the defendants, a reckless disregard for human life which resulted in the death of the victim could be the basis for the death penalty even though the "lethal result" was not an "inevitable" result of the conduct. *Id.* at 158. Clearly this Court in *Tison* recognized that defendants should be criminally liable for the harm they caused.

Felony murder at early common law held a felon morally culpable for an unintended death which occurred during the commission or attempted commission of a felony. While the felony murder doctrine has been refined and limited in many American jurisdictions, "the felony-murder doctrine is well entrenched in American law." W.R. LaFave & A. Scott, Criminal Law § 7.5, p. 640 (2d ed. 1986). Under this doctrine one committed a felony at one's own risk and with the understanding that one would be criminally liable for all deaths caused by one's commission of the felony. The theory of punishment underlying the felony murder rule was that it would serve as a deterrent to the commission of felonies or at least the commission of felonies in violent ways. The felon was acting with the risk that a death might occur which he did not intend but for which he would be held strictly accountable.

The common law through the **crime of attempt** has long recognized that intent alone is not enough to create criminal liability and that the result of the criminal enterprise is determinative of proper punishment. The criminal law has always recognized that one who attempts to commit murder but fails to accomplish that end will be punished, but never to the extent of one who succeeds. While both the murderer and the attempt murderer have the same intent, the criminal law gives the greatest sanction to the defendant who causes the greatest harm. "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the

gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." *Booth v. Maryland*, 482 U.S. 496 (Scalia, J., dissenting). "The only distinction is the harm to the community which results from the defendant's actions, and this distinction is deemed sufficient to support a difference in punishment between a sentence of years and the ultimate penalty." *South Carolina v. Gathers*, 109 S.Ct. 2207, 2215 (1989) (O'Connor, J., dissenting).

The doctrine of legal impossibility also demonstrates how the intent of the actor alone is not enough to create criminal liability. This doctrine holds that one is not guilty of an attempt to a crime if the actual result intended is not proscribed by the criminal law. "'[A]n immoral motive to inflict some injury on one's fellows coupled with a misapprehension about the content of the criminal law are not good reasons for conviction.'" W.R. LaFave & A. Scott, Criminal Law, § 6.3, p. 514 (2d ed. 1986). Again, through the doctrine of legal impossibility, the criminal law affirms the premise that it is the harm of the criminal endeavor that matters, not just the intent to cause the harm.

The criminal law as enforced throughout the United States is replete with examples where the punishment assessed the criminal is directly dependent upon the harm caused and not the moral culpability of the defendant. As a member of this court has observed, a motorist who runs a stoplight and kills someone will receive far greater punishment than a motorist who merely runs a red light without injury. The two motorists share the same moral culpability but not the same punishment merely because the harm caused by the former far exceeds the harm caused society by the actions of the latter. *Booth v. Maryland*, 482 U.S. at 517 (White, J., dissenting). Likewise, in California, one man may shoot a gun into the air to celebrate New Year's Eve and be in violation of a statute which

punishes such dangerous conduct, but if the bullet he has discharged into the air returns to earth and kills a young child, he may be held accountable for criminally negligent homicide although his intent was but to celebrate New Year's Eve, albeit in a dangerous mode. The gun shooter is such a circumstance is being directly punished for the harm he has caused and not the intent of his actions. California Penal Code section 246.3.

Thus, *Booth* divorces capital offenses from the consistent notion running through the common law that a defendant's criminal liability is measured to a large extent by the result of his conduct. Indeed, "[t]he goal of truly 'individualized' punishment . . . should allow the State to include as a capital sentencing consideration the particularized harm caused by an individual murder." Note, *Booth v. Maryland* -- Death Knell For the Victim Impact Statement, 47 MD.L.REV. 701, 713 (1988).

B

Common Principles Of Morality Dictate That The Amount Of Harm Done Does Bear On The Extent Of One's Personal Responsibility

The argument that one's responsibility for his acts should be limited only to the intention of the act alone and remain uninformed by the harm caused is to divorce the criminal law from the common principles of morality operative in an ordered society and to disregard the inestimable circumstances of every day life where one is held liable for the harm caused by one's actions. For example, if two boys go to play catch on a neighbor's property, where they know they are forbidden to play because of nearby windows, they may be concerned about being caught. But the concern of both the boys and their elders will be suddenly transformed if a negligently thrown ball smashes one of those windows. The fact of the ball going

through the window, although quite unintentional, transforms the situation. Even relatively young children in such a circumstance would recognize in a flash that they bear responsibility for that broken window, although they did not intend to break it. The situation becomes that much more a cause for concern if the ball not only breaks the window but beans the neighbor inside the house. And if the neighbor happens to be a little old lady with brittle bones, the situation has the potential for tragedy -- for the boys, as well as for the old lady.

Yet, in all four scenarios, the youngsters intent was the same -- intentionally to play catch in a place they were not supposed to. But their degree of responsibility is very much dependent upon the degree of harm done, though not because that harm was intended. Indeed, one of the greatest principles we attempt to impart to our children is that they must accept the consequences of their behavior, and this often includes suffering sanctions for the unintended results of both negligent and miscreant acts.

The point of this rather homey example is not to minimize the weighty issues presented by *Booth*. Still less is it to suggest that intention is irrelevant to personal responsibility. It is not. The point is rather to emphasize how singularly inadequate is the moral world, as it is conceived of in *Booth*, compared to flesh-and-blood reality. We are concerned in the case at bar with basic notions of legal and moral responsibility -- notions which *Booth* simply fails to capture. By contrast, the richness of our settled traditions of the common law and our ordinary moral discourse partake of profound and incisive wisdom. We cut ourselves off from their lessons at our peril.

CONCLUSION

Booth v. Maryland was incorrectly decided. It is unsupported by prior constitutional jurisprudence. It is consistent neither with common law tradition nor with the moral underpinnings of our society. Its continued viability serves only to confuse and undermine the legitimate goals of the law. For the reasons set forth above, *Booth* should be overruled.

Respectfully submitted on behalf of the
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BRIEF

MOTION FILED
DEC 17 1990
FOR ARGUMENT

(10)

89-1944

No. 89-1994

IN THE
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October Term, 1990

STATE OF OHIO
Petitioner,
v.
EDIBERTO HUERTAS
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NATIONAL LEGAL AID & DEFENDER ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

National Legal Aid and Defender Association (NLADA) respectfully moves this Court for leave to file the attached brief amicus curiae in support of respondent. Respondent has consented to the filing of such a brief. The consent of Petitioners was requested, but Petitioners have withheld their consent.

Founded in 1911, NLADA is a private, non-profit national membership organization whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. NLADA represents approximately 1,780 programs engaged in providing representation to indigents in civil cases, and 774 defender and assigned counsel offices engaged in providing representation to indigents in criminal cases.

NLADA is vitally interested in protecting the rights of indigent prisoners in capital cases. Attorneys and organizations affiliated with NLADA represent condemned inmates in states throughout the United States. In response to the need for quality representation in death penalty cases, NLADA: adopted Standards for the Appointment and Performance of Counsel in Death Penalty Cases; publishes Capital Report, which features articles on trends in the trial, appellate, and post conviction stages of death penalty cases; annually conducts a training program for attorneys engaged in or about to become engaged in the defense of capital cases; provided comment on counsel in capital cases to the Ad Hoc Committee of the Judicial Conference of the United States on Federal Habeas Corpus Review in Capital Cases; and testified concerning counsel before the American Bar Association Task Force on Death Penalty Habeas Corpus.

NLADA is thus particularly well-situated to articulate to this Court the complexities and difficulties unique to capital litigation and the benefits, both to the interests of the litigants themselves and to the interests of the

judicial system in fairness and reliability in the determination that death is the appropriate punishment.

NLADA believes that it can provide valuable insights into issues that may not be stressed by the parties. The attached brief emphasizes that the holding of Booth v Maryland, 482 U.S. 496 (1987) should be reaffirmed because the jury's consideration of victim impact evidence cannot be controlled adequately by jury instructions that will yield predictable, not arbitrary results, reviewable by appellate courts. Furthermore, it is the legislature that properly should determine those harms for which the death penalty applies.

Accordingly, NLADA respectfully requests that its motion for leave to file the attached brief amicus curiae be granted.

Dated: December 17, 1990

Respectfully submitted,

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No. 89-1944

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF OHIO
Petitioner,

v.

EDIBERTO HUERTAS
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The interests of the amicus curiae are fully set forth in the accompanying Motion for Leave to File Brief Amicus Curiae.

SUMMARY OF ARGUMENT

This Court correctly decided in Booth and Gathers that victim impact evidence, unrelated to the immediate circumstances of the offense, "creates an unacceptable risk" of unconstitutionally arbitrary application of the death penalty. Booth did not create a rule barring the consequences of a defendant's acts from playing a role in decisions to impose the death penalty. It simply recognized victim impact evidence as too perilous an influence on the jury's discretion in a highly sensitive context. The peril derives from the extreme subjectivity of the evidence, its inherent but unprovable unreliability, and its unmanageability. Its power to influence the jury is great, but the influence is highly idiosyncratic and likely to inject improper cultural, religious, ethnic or other prejudice into

the proceeding. The uniqueness of the evidence, and its subjectivity, make it virtually impossible to control through jury instructions or special verdicts that would separate its proper use from its many improper uses. For the same reasons, the effects of victim impact evidence resist the safeguard of appellate review, on which this Court heavily relies to protect against arbitrary and disproportionate application of the death penalty.

Society's interest in holding defendants responsible for the full consequences of their acts, including unintended consequences, can be fully vindicated in the legislature, through the definition of capital offenses and the specification of aggravating factors capable of triggering the death penalty. Rather than the subjective, unmeasurable

harm related by surviving members of the deceased's family to a jury, legislation will reflect societal consensus about the importance of verifiable consequences. The high risk of arbitrary jury decisions is not necessary to give voice to victim's concerns.

ARGUMENT

THIS COURT CORRECTLY DECIDED IN BOOTH THAT COLLATERAL PROCEEDINGS FOCUSED ON THE VICTIM THREATEN THE CONSTITUTIONAL VIABILITY OF THE PENALTY PHASE TRIAL, WHETHER THE DEFENDANT WAS ACQUAINTED WITH THE VICTIM OR WAS A STRANGER

In Booth v. Maryland, 482 U.S. 496 (1987) this Court correctly held the state's use of evidence about a victim's personal characteristics or the emotional effect of a victim's death upon family or community members at a death penalty hearing "creates an unacceptable risk that the jury may impose the death penalty in

an arbitrary and capricious manner."[1] 482 U.S. at 503

The constitutional infirmity of this evidence is not that it introduces "harm" into the question of the defendant's "personal responsibility and moral guilt", Enmund v. Florida, 458 US 782, 801(1982), but that it introduces subjective, emotional, non-quantifiable harm. This kind of evidence, introducing this kind of harm, obstructs the constitutional goals of reliability, predictability and proportionality. At the same time, it

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[1]The Court did not hold, as suggested by Petitioner's Amicus here, "that the harm caused by a murder does not, and constitutionally may not bear on the appropriateness of capital punishment." Brief For The United States as Amicus Curiae at 11. Petitioner and its Amici over-interpret the Booth rule. Harm, of course, directly determines the appropriateness of the death penalty at many levels. Booth simply recognizes that certain types of harm are too subjective, and the emotional impact too distracting, to pass constitutional muster on the issue of life or death.

diverts the jury's attention from its decision about what will happen to the defendant, into a moral and emotional evaluation of the victim and the victim's family and community.

1. Victim Impact Evidence Offends The Constitution Because It "Injects An Element Too Speculative For The Jury's Consideration."

Petitioner and Amici ask this Court to overturn the holding in Booth and allow testimony at death sentencing hearings about the personal characteristics of the deceased victim, and about the emotional effect of the offense on the victim's family and community.[2] This evidence,

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[2]Petitioner suggests, alternatively, that this Court acknowledge an exception, unrecognized in Booth, allowing the use of victim impact evidence in cases where the defendant knew the victim and could have foreseen the impact in question. Brief for Petitioner at 12. This distinction makes no sense, however, under the theory that victim impact evidence tends to prove the defendant's "personal responsibility and moral guilt," Booth, 482 U.S. at 519

according to Petitioner, would allow the sentencing jury to calculate the amount of harm caused by the defendant, and factor that into its assessment of the defendant's culpability when it decides whether the defendant deserves execution. This Court should adhere to its holding in Booth, because the Constitution does not tolerate the degree of subjectivity and unpredictability that victim impact evidence would infuse into the death sentencing decision. The decision to take

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(Opinion of Scalia, J., dissenting). Legal doctrines recognize the complications flowing from existing relationships between people may actually reduce the defendant's culpability. See, e.g., Strickland v. State, 257 Ga. 230, 357 S.E.2d 85 (1987) (wife's infidelity "critical" to defendant's claim of provocation supporting the lesser offense of voluntary manslaughter); McClure v. Texas, 575 S.W.2d 564 (Tx. 1979) (same). People in society may be assumed to have relatives and friends who would be affected by their deaths, and therefore the stranger inflicting random destruction upon strangers is arguably the more culpable.

or spare a defendant's life must be "controlled by clear and objective standards so as to produce nondiscriminatory application," California v. Brown, 479 U.S. 358, 107 S.Ct. 837, 841 (1987) (Opinion of O'Connor, J., concurring, quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)).

There are two elements to the subjectivity of victim impact evidence: the witness' subjective understanding and the listener's subjective perception. The idiosyncratic synergy of the two would become the measure of harm in any particular death penalty case. For example, Mrs. Harris' anguished recollection of her son as a "child that never gave [her] no problem, no nothing, no drinking, no smoking, nothing but go to church and come back and do his Army....," J.A. at 133, contains her subjective view

of what constitutes obedience, interpreted through each juror's own idea of that trait. Likewise, the value attached to her report that he was a church-goer, like the value of the religious devotion described in South Carolina v. Gathers, U.S. , 109 S.Ct. 2207 (1989), depends on the religious beliefs of the jurors. Jurors subscribing to agnostic, atheist, or non-Christian beliefs could ascribe a value to that trait very different from the value assigned by a juror who was also a church-goer.

The unacceptable subjectivity of this evidence becomes abundantly clear when one imagines the victim impact evidence in the form of a statutory aggravating factor. A statute allowing the death penalty for those who kill "church-goers," for instance, or "obedient offspring," or "good mothers" could not withstand

constitutional scrutiny for clarity and objectivity. See, Godfrey v. Georgia, 446 U.S. 420 (1980); Zant v. Stephens 462 U.S. 862 (1982).

As the church-goer example illustrates, a juror's response to the victim's characteristics, or to the reactions of victim's family and friends, may depend largely on the degree of cultural empathy the juror feels. Jurors will value more highly those victims more "like" themselves and those witnesses with whose reactions they more closely identify. See, Talbert, The Relevance Of Victim Impact Statements To The Sentencing Decision, U.C.L.A. L. Rev. 199, 222 (1988) (noting that even under the strongest theoretical justification for victim impact evidence in capital sentencings, the sentencer's calculation of victim harm requires "a measurement that is difficult

to make objectively").[3]

The Constitution does not permit such subjectivity, encompassing cultural, religious or class factors, a legitimate role in death sentencing decisions. Cf. McCleskey v. Kemp, 481 U.S. 279, 316-318 (1987) (rejecting statistical challenges, but acknowledging arbitrariness of such factors).

The jury's isolation in considering a single case further impedes its objectivity. The victim in that case is the only victim for that jury. While the Court recognizes retribution as a legitimate goal of the death penalty, South Carolina v. Gathers U.S. , 109 S.Ct. at 2214 (Opinion of O'Connor J.,

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[3]The problem here is not simply the jurors' reaction to the witnesses, which may be a factor any time a witness testifies in any hearing for any purpose. It is that the jury must place a value on the harm described, or on the life that was taken.

dissenting), the jury drawn into focusing on a single victim runs the grave risk of assuming the retaliatory mantle of the survivors. As one commentator notes, the "victim's desire for vengeance conflicts with two principles that apply even to retributive sentencing: proportionality and equality." Henderson, The Wrongs of Victim's Rights, 37 Stan.L.Rev.933, 996 ("Henderson").[4] This distortion deepens, because victim impact evidence re-focuses the sentencing trial on a comparison between the character of the defendant and the character of the victim. By contrast with the defendant, already found guilty of murder, even a tarnished victim achieves purity in death.[5]

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[4]This problem infects a victim impact witness' specific recommendations for sentencing to an even greater degree.

[5]Thus in Gathers and in Mills v. Maryland, 486 U.S. 367, 396 (1988) (Opinion of Rehnquist, J., dissenting),

2. Jury Instructions Cannot Adequately Control The Jury's Use of Victim Impact Evidence To Yield Predictable, Not Arbitrary Results, Reviewable By Appellate Courts.

Ohio, typical of most states employing the death penalty, provides a list of "specifications," or aggravating factors, designed to "narrow the class of persons eligible for the death penalty," and "justify the imposition of a more severe sentence" on this group of defendants in comparison to others convicted of murder, Zant v. Stephens, 462 U.S. at 877. As in other states, however, Ohio's eight "specifications" cover a

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victims who had lived on the unfortunate margins of society were nevertheless successfully portrayed in terms of moral superiority. Without relying on the infinitely subjective effect of victim impact evidence, however, homicide statutes themselves accord equal dignity to the most modest life and the most august, except where societal interests demand special protections for public servants, or for classes of people more vulnerable to victimization.

broad range of behavior, including purposeful killings in the course of many serious felonies, those committed while escaping or fleeing, those involving more than one potential victim, those involving witnesses, and others. Ohio Rev. Code Ann. § 2929.04 (Page's 1987), see Brief For Respondent at Appendix. The selection, from this relatively large aggregate, of those actually to be executed, rests in the jury's discretion.

From the first, this Court has recognized the crucial role played by instructions in assuring the jury exercises that discretion in a constitutionally acceptable manner. Gregg v. Georgia, 428 U.S. at 192.[6] In Godfrey

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[6]In Gregg, the Court said

> the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment,

v. Georgia, the Court reversed a death sentence that rested on a broad aggravating circumstance, providing the death penalty for a killing that "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim." 446 U.S. at 422 (Opinion of Stewart, J.). Justice Stewart noted "a person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible

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> especially if sentencing is performed by a jury. Since members of a jury will have had little, if any previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given....It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.

Id. (Opinion of Stewart, Powell and Stevens, JJ.)

and inhuman'," and faulted the trial court for failing to offer the jury any guidance in applying the terms. Id. at 428-429. More recently in Penry v. Lynaugh, 109 S.Ct. 2934 (1989), the Court found penalty phase jury instructions constitutionally deficient, despite the jury's response to the three "special issues" questions Texas uses to channel jury discretion.[7]

This Court recognizes the special sensitivity of penalty phase juries to improper influence from jurors' personal

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[7]The Court found the jury instructions flawed for failing adequately to direct the jury to consider evidence of the defendant's mental retardation in mitigation:

> ...in the absence of instructions informing the jury that it could give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence...

109 S.Ct. at 2952.

prejudices. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683 (1986)(requiring jury voir dire on racial views for a capital sentencing involving an interracial crime). Justice White, writing for himself and three other members of the Court, found the need for extra precautions, based on "the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case," as well as on facts showing interracial violence. Id. at 1689. He found greater opportunity for the operation of prejudice in the jury's discretionary function at the sentencing than in its normal factfinding role. Id. at 1688 n.8. Admitting victim impact evidence would broaden the scope of the jury's discretion still further, allowing a focus on the victim, as well as on the

defendant's character and background and the immediate circumstances of the crime.

In this context, the susceptibility of victim impact evidence to inspire prejudice calls for carefully crafted instructions to guide the jury away from its many improper uses. At the same time, the variability and idiosyncracy of victim impact evidence pose a virtually insurmountable hurdle to the drafting of instructions.

To avoid the unconstitutional risk of arbitrary and capricious results, state courts instructing juries in the use of victim impact evidence would have to tailor their advice to the particular goals specified by the legislature for applying the death penalty. In light of this Court's jurisprudence assuming the sentencing focus to rest on the defendant, they would navigate in uncharted waters.

Nor would they have any logical star, guiding them in telling jurors how to measure the harm that extends beyond the immediate circumstances of the crime, how far to look for that harm, whose value to place on the harm, or how to weigh this evidence in relation to information they learn about the defendant. Although Petitioner suggests the jury could use evidence about the victim's qualities, or about the effect of the victim's demise on others, to rebut mitigation evidence about the defendant's characteristics, they are not logically related. The jury decides only the defendant's fate, and the victim evidence only legitimately comes in to establish something about the defendant's culpability or personal responsibility. In part for this reason, trial courts would not be able to use the simple expedient of telling juries to "weigh the

aggravating and mitigating circumstances," and that they are "free to assign whatever moral or sympathetic value [they] deem appropriate to each and all of the various factors you are permitted to consider," Boyde, California, 110 S.Ct. 1190, 1195 n.3 (1990) (quoting a California instruction).[8] It is not unrealistic to think the difficulty of that task, together with the variation in state schemes, state case law, and the unique facts surrounding each victim, would yield years of litigation.

Reviewing courts, on the other hand, would face a daunting task in discerning

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[8]As Justice Rehnquist has noted, there is a strong likelihood that sympathy and other "extraneous emotional factors...would be far more likely to turn the jury against a capital defendant than for him." California v. Brown, 107 S.Ct. at 840.
Obviously this is far more true in a case where the jury hears emotionally charged victim impact evidence as in Respondent's hearing.

the proper from the improper uses of victim impact evidence. State courts have relied on special verdicts to ensure constitutionally adequate appellate review in many death penalty jurisdictions. But see, Penry v. Lynaugh 109 S.Ct. 2934 (special verdict inadequate to assure proper consideration of mitigation evidence). However, drafting special verdict forms raises the same intractable problems as the drafting of instructions. This Court places great importance on appellate review to assure the constitutional application of the death penalty. See California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 840; Godfrey v. Georgia, 446 U.S. 420; Gregg v. Georgia, 428 U.S. 153. In Godfrey, Justice Stewart reinforced the requirement that death penalty procedures be "rationally reviewable," and found the "standardless

and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by" affirmance in the Georgia Supreme Court. 446 U.S. at 429. The use of victim impact evidence invites the likelihood of similar flaws. This problem alone merits reaffirming the rule in Booth.

3. Collateral Proceedings Focused On the Victim Would Fall Short Of Constitutional Requirements For Reliability In Death Penalty Sentencings.

In Booth, the Court predicted mini-trials revolving around victim impact evidence, diverting the jury from its "constitutionally required task" of deciding the defendant's sentence. 482 U.S. at 507. Besides the diversion, and, as the Court noted, the "unappealing" prospect of fights over the deceased's character, mini-trials offer little hope

of producing reliable evidence about the harm caused by the defendant.

The Constitution requires special assurances of reliability in death penalty hearings because of the unique finality of the sentence. Gardner v. Florida, 430 U.S. 349, 358 (1977)(Opinion of Stevens, J., recognizing due process requirements in the penalty phase); id. at 363 (opinion of White, J., concurring, recognizing eighth amendment process requirement for reliability). There appears general agreement that the defendant would have the right to challenge victim impact evidence through cross examination and rebuttal evidence.,[9] and by logical

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[9]See, Booth v. Maryland, 482 U.S. at 506 ("Presumably the defendant would have the right to cross-examine the declarants..."); id. at 518 (White, J., dissenting "[n]o doubt a capital defendant must be allowed to introduce relevant evidence in rebuttal to a victim impact statement..."); South Carolina v. Gathers, 109 S.Ct. 2207, 2217 (1989)(O'Connor, J.,

extension to produce negative evidence about the victim as an independent matter.[10]

If cross-examination is the "greatest legal engine ever invented for the discovery of the truth," California v. Green, 399 U.S. 149, 158 (1970), however, at least three forces act as breaks on that engine in the case of victim impact evidence. As a matter of substance, much of it will be unchallengeable. In this

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dissenting and quoting White, J., in Booth). See also, Gardner v. Florida, 430 U.S. 349.

[10]Defense Counsel meeting their obligations under Strickland v. Washington 466 U.S. 688, reh.den. 467 U.S. 1267 (1984) and the American Bar Association Standards for Criminal Justice ("The Defense Function") would have to undertake affirmative investigation of victim impact, and request exculpatory material under Brady v. Maryland, 373 U.S. 83 (1963). Because of the highly personal nature of victim impact evidence, these obligations would include attempts at personal interviews and efforts to obtain otherwise private materials such as psychiatric, medical, or court records.

case, for example, Mrs. Harris' testimony about dreading to take her grandson to the victim's grave, J.A. 133, like the sleep disturbance in Booth, is too personal and subjective to test. As a matter of investigation and discovery, the truth about past relationships or character of the decedent will have undergone natural transformation in the grieving process, and may simply be unavailable. To the extent it may be found in confidential records, courts will naturally resist impinging on the privacy of grieving relatives to disclose it to the defense. And finally, tactical considerations will prevent challenging obviously grief-stricken witnesses or "speaking ill of the dead.[11] All of these factors serve to

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[11]Justice White suggests, in Booth that the defense may wisely refrain from challenging victim impact testimony, or introducing rebuttal evidence, and should not be heard to complain about its

prevent the jury from hearing the truth, and to render the due process right a hollow one.

The barriers to the truth-seeking process in connection with victim impact evidence only exacerbate its inherent lack of reliability. The vision of Mrs. Harris testifying about her son no doubt vividly reflects the emotional impact of his death upon her, and no doubt she testified without guile. But her son's death may well have had a substantial impact on the accuracy of her testimony about his character traits as well. It is highly unreasonable to expect grief-stricken family members or friends to report accurately on the characteristics or

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tactical decision to avoid offending the jury. 482 U.S. at 518, and n.3 (Opinion of White, J., dissenting). While such a tactical imperative may reduce the chances of a full-fledged "mini-trial," it directly undercuts the reliability of the evidence and the jury's verdict.

relationships of the recently deceased. Furthermore, the witness' view of the impact of the offense usually changes over time, as the person goes through his or her stages of adjustment. See, Henderson, 37 Stan. L. Rev. at 960-966, 996-999.

4. The Legislature Properly Should Determine Those Harms For Which The Death Penalty Applies To Hold Defendants "Personally Responsible."

The unique, subjective character of victim impact evidence renders it constitutionally unsuitable for consideration by death penalty juries on an ad hoc basis. This does not mean, however, that society cannot hold defendants personally responsible for harm they cause, and apply the death penalty on those grounds. The appropriate process is legislative, not judicial.

The legislature's open forum assures at least a minimum consensus on the value

of harms designated as aggravating circumstances. Furthermore, constitutional requirements for the death penalty structure assure aggravating circumstances will be adequately defined. See, Godfrey v. Georgia, 446 U.S. 420. Finally, the evidence establishing that harm in a particular case must survive the gauntlet of proof, rather than simply blending into the sea of discretion.

Not surprisingly, when the legislature
differentiates between offenders of equal "moral guilt", based on the amount of harm they cause, or the characteristics of their victims, it prescribes objective standards. In the case of the bank robber who shoots at a guard, or the reckless driver, See Booth v. Maryland, 482 U.S. at 516 (Opinion of White, J. dissenting); id. at 519 (Opinion of Scalia, J.,

dissenting), the victim either lives or dies. If the harm amounts to death, the perpetrator is eligible to face execution. In the case of provisions allowing the death penalty for the murder of public officials, or police officers see, e.g., Ohio Rev. Code Ann. § 2929.04(1) & (6), the victim's status is objectively defined; the person either is or is not a police officer or other public official. Similar objective criteria distinguish other victims, such as the elderly or the very young, to whom legislatures provide the added protection embodied in the death penalty.

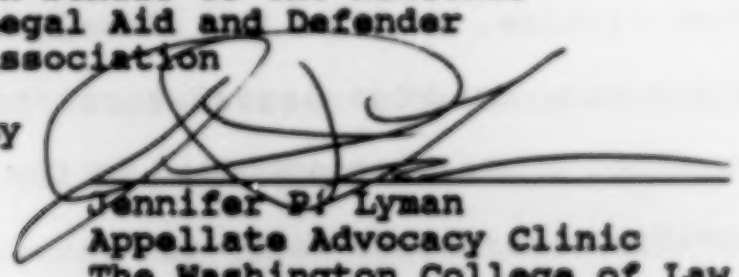
The constitution clearly permits legislatures to hold defendants "personally responsible" for the amount of harm they cause, as long as a fact finder can measure the harm against an objective standard, leading to "an objective,

evenhanded, and substantively rational" differentiation between those sentenced to death and those sentenced to life. Zant v. Stephens, 462 U.S. at 879.

CONCLUSION

The holding of Booth v. Maryland should be reaffirmed, and the judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted
on behalf of the National
Legal Aid and Defender
Association

By 

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CERTIFICATE OF SERVICE BY MAIL

NO. 89-1944

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OHIO,
Petitioner,
v.

EDIBERTO HUERTAS,
Respondent.

Jennifer P. Lyman, a member of the Bar of the Supreme Court of the United States, states:

That her business address is Appellate Advocacy Clinic, The Washington College of Law, 4400 Massachusetts Avenue, N.W., Washington, D.C. 20016; that on December 17, 1990, she caused to be served a true copy of the attached Motion for Leave to File Brief and Brief of the National Legal Aid and Defender Association as Amicus Curiae in the above-entitled matter, on counsel for Petitioners and counsel for Respondents by having the same placed in an envelope addressed as follows:

GREGORY A. WHITE, Prosecuting Attorney
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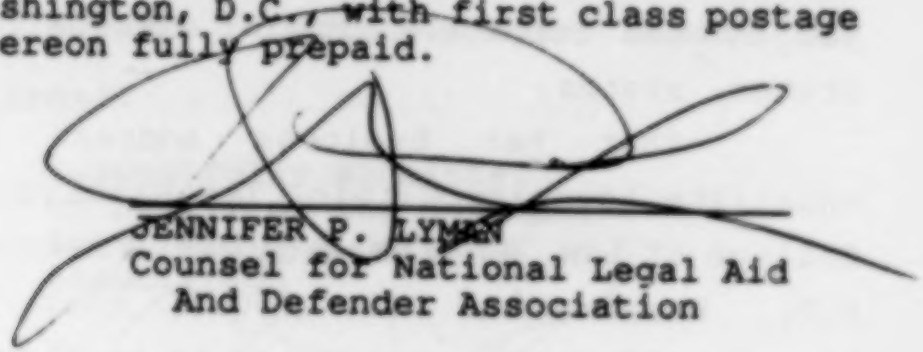
Said envelopes were then sealed and deposited in the United States mail at Washington, D.C., with first class postage thereon fully prepaid.



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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
DEC 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1944

IN THE

Supreme Court of the United States

October Term, 1990

STATE OF OHIO,

Petitioner,

v.

EDIBERTO HUERTAS,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF PROFESSORS BARBARA BABCOCK, MICHAEL CHURGIN, WALTER E. DELLINGER, SANFORD LEVINSON, FRANK MICHELMAN, AVI SOIFER, ROBERT WEISBERG, CHARLES OGLETREE, TRACEY MACLIN, AND LARRY YACKLE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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No. 89-1944

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF OHIO,

Petitioner,

v.

EDIBERTO HUERTAS,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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Professors of Law Barbara Babcock, Michael Churgin, Walter E. Dellinger, Sanford Levinson, Frank Michelman, Avi Soifer, Robert Weisberg, Tracey Maclin,

Charles Ogletree, and Larry Yackle move the Court, pursuant to Rule 37.4, for leave to file the attached brief as amici curiae in support of the respondent, Ediberto Huertas.

1. Respondent has consented to this filing but counsel for petitioner the State of Ohio has refused, necessitating this motion.

2. Amici curiae are professors of constitutional law and criminal law at various law schools throughout the country. Barbara Babcock and Robert Weisberg are professors of law at Stanford Law School. Michael Churgin and Sanford Levinson are professors of law at the University of Texas Law School. Walter E. Dellinger is a

professor of law at Duke Law School. Frank Michelman and Charles Ogletree are professors of law at Harvard Law School. Avi Soifer, Tracey Maclin, and Larry Yackle are professors of law at Boston University Law School. Counsel for amici are professors at the School of Law at the University of North Carolina at Chapel Hill.

3. Many of the present amici joined in filing a similar brief in South Carolina v. Gathers, 109 S. Ct. 2207 (1989) (No. 88-305).[1] In Gathers, amici argued that, quite apart from

[1] Each reference to the Motion for Leave to File Brief Amicus Curiae and Brief of Professors of Law Barbara Babcock, et al. as Amicus Curiae in South Carolina v. Gathers, 109 S. Ct. 2207 (1989) (No. 88-305), will be indicated by the abbreviation "Professors' Brief" followed by the

substantive criminal law considerations, "the larger consequences" of a decision to overrule Booth counseled strongly against acceptance of the State of South Carolina's position, especially the "substantial risk that doing so would erode the Court's moral authority." Professors' Brief, Motion at 3. Amici then said:

> [T]he reason[] the Court's pronouncements carry moral authority [is] . . . that they are seen as arising from impartial and reasoned judgments. Amici submit that the conditions which permit the Court to overrule precedent without undermining its moral authority are not so clearly present that the Court can overrule Booth without

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number of the page on which the reference may be found.

> creating a substantial risk of incurring such erosion.

Id. at 3-4. The Court in Gathers ultimately declined to overrule Booth. See Gathers, 109 S. Ct. at 2211 (White, J., concurring) ("[u]nless Booth is to be overruled, the judgment below must be affirmed").

4. Although the question presented by the State of Ohio in Huertas did not appear to reopen this issue[2], the Solicitor General and amici

[2] The question presented by the State of Ohio in its petition for certiorari asks simply "[w]hether the Ohio Supreme Court has wrongfully interpreted Booth . . . and . . . Gathers" by excluding victim testimony under certain limited circumstances arguably present in the Huertas case. Petition for Writ of Certiorari to the Supreme Court of Ohio at I, Ohio v. Huertas, No. 89-1944. In contrast, the questions presented by the State of South Carolina in Gathers explicitly sought reconsideration of Booth, asking: "Did this Court's decision in Booth v.

curiae in support of the petitioner have called on the Court to once again consider overturning Booth and now Gathers. See SG Brief at 18-21; WLF Brief at 18-20.[3] In its brief on the merits, the State of Ohio now has joined this call, attempting to enlarge its original grant of certiorari by urging

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Maryland misconstrue requirements of the Eighth Amendment, and was it wrongly decided?" South Carolina v. Gathers, 57 U.S.L.W. 3265 (No. 88-305).

[3] Each reference to the Brief of the United States as Amicus Curiae Supporting Petitioner in Ohio v. Huertas, No. 89-1944, will be indicated by the abbreviation "SG Brief," followed by the number of the page on which the reference may be found. Each reference to the Motion for Leave to File Brief and Brief of Washington Legal Foundation, et al., as Amici Curiae in Support of Petitioner in Ohio v. Huertas, No. 89-1944, will be indicated by the abbreviation "WLF Brief," followed by the number of the page on which the reference may be found.

that Booth itself be reconsidered. State's Brief at 35-50.[4]

5. Yet the stare decisis considerations which many of the present amici marshaled in Gathers have lost none of their force in the intervening year and a half. The factors which traditionally have prompted the Court to repudiate a recently announced constitutional rule have not suddenly emerged here. There is no new evidence that Booth has proven unworkable -- that it has led to serious confusion in implementation, that it has disrupted state

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[4] Each reference to the Brief on the Merits of the State of Ohio in Ohio v. Huertas, No. 89-1944, will be indicated by the abbreviation "State's Brief," followed by the number of the page on which the reference may be found.

criminal procedures, or that courts have refused to honor its teaching in practice. Nor have there been changes in constitutional doctrine that might undermine the authority of Booth. What amici stated in 1989 remains true:

> Even those Justices who disagreed with Booth have pointed to nothing in the result or the majority's opinion that is worse than an incorrect judgment call on a narrow issue about which views can reasonably differ. No major principle of constitutional law, having the potential to shape the growth of constitutional doctrine, is implicated in the debate between the majority and the dissent in Booth nor is there any large issue of governmental power or direction that rides on the question of whether Booth is overruled; moreover, there is no indication that Booth has been seen as such an aberration by the states that it has caused disruption in the administra-

> tion of their capital sentencing schemes.
>
> In short, the substantive issue in Booth is not important enough to warrant reversing the Court's position on it at the cost of the harm which such reversal will do to the values of stare decisis, and the appearance that will be created that the identity of the Court's personnel is the key factor driving the decision to overrule.

Professors' Brief at 3-4.

6. Present amici therefore file this brief to re-present their concerns on an issue that was vigorously debated in Gathers and which all assumed had been settled there once and for all.

DATED this 17th day of December, 1990.

Respectfully submitted,

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INTEREST OF AMICI 2

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE PUBLIC'S FAITH IN THE IMPARTIALITY OF THE JUDICIARY SHOULD NOT BE WEAKENED BY AN ABRUPT DEPARTURE FROM RECENT, CAREFULLY CONSIDERED DECISIONS OF THE COURT, ABSENT SIGNIFICANT INTERVENING CIRCUMSTANCES. 6

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No. 89-1944

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF OHIO,

Petitioner,

v.

EDIBERTO HUERTAS,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

==========

BRIEF OF PROFESSORS BARBARA BABCOCK, MICHAEL CHURGIN, WALTER E. DELLINGER, SANFORD LEVINSON, FRANK MICHELMAN, AVI SOIFER, ROBERT WEISBERG, CHARLES OGLETREE, TRACEY MACLIN, AND LARRY YACKLE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

==========

INTEREST OF AMICI

The interest of amici is set out in the Motion accompanying this brief.

SUMMARY OF ARGUMENT

This Court does not treat its own precedents lightly, and with good reason. In most areas, as Justice Brandeis long ago observed, law, lawyers and the general public have a greater need for rules that are settled and predictable than for rules that are undebatably "right" in some abstract sense. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Moreover, abrupt departures from prior decisions threaten the great confidence normally reposed in

the federal courts by the general public; that confidence stems in large measure from the belief that courts will dispense an impartial justice, and that legal doctrines reflect something more permanent than the shifting membership of the Court.

For these and other reasons, the Court traditionally has honored the principle of stare decisis, and normally has acted to overrule a prior decision only when faced with either (i) some significant change in social conditions, (ii) some significant additional factual information not previously raised or considered at the time of the earlier decision, or (iii) some pronounced change in the legal doctrines upon which the prior decision depends.

The "rare circumstances" that would warrant the repudiation of Booth v. Maryland, 482 U.S. 496 (1987), simply are not present. This precise issue was fully explored less than two years ago -- with ample consideration not only of stare decisis principles but of all the countervailing arguments -- in South Carolina v. Gathers, 109 S. Ct. 2207 (1989). It would require a remarkable showing of changed circumstances to overcome the especially "heavy burden" which rests on a party advocating the repudiation of both Booth and Gathers.

Yet Huertas suggests nothing which might justify a departure from this Court's settled precedents. The social conditions that Booth exists to address -- in particular, the recognized danger

that death sentences may turn upon arbitrary or capricious factors such as the victim's race or socioeconomic status -- surely have not changed significantly since 1989. No new knowledge about victim impact evidence has been gleaned since Gathers. The basic Eighth Amendment principles called forth in Booth remain the same. Experience under Booth, moreover, reveals no basis for consternation. There is no indication that Booth has been an inappropriate impediment to prosecutors, an unworkable rule for judges, or a threat to democratic self-governance under a constitution.

Principles of stare decisis dictate that a "heavy burden" faces those who wish to overturn settled precedent.

With respect to Booth and Gathers, the burden simply has not been borne.

ARGUMENT

I. THE PUBLIC'S FAITH IN THE IMPARTIALITY OF THE JUDICIARY SHOULD NOT BE WEAKENED BY AN ABRUPT DEPARTURE FROM RECENT, CAREFULLY CONSIDERED DECISIONS OF THE COURT, ABSENT SIGNIFICANT INTERVENING CIRCUMSTANCES.

Justice Roberts cautioned nearly half a century ago that "[r]espect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy." Mahnich v. Southern Steamship Co., 321 U.S. 96, 113 (1944) (Roberts, J., dissenting). "[S]ociety . . .

presume[s] that bedrock principles are founded in the law rather than in the proclivities of individuals." Vasquez v. Hillery, 474 U.S. 254, 265 (1986). It is out of respect for these stare decisis concerns, as we noted in 1989, that:

> even when there has been a change in the composition of the Court, a dissenter in an earlier case may well hesitate to overrule the decision, fearing that "the Court's reputation will suffer if the doctrinal shift is perceived to be the result of nothing except altered membership." Kelman, The Forked Path of Dissent, 1985 Sup. Ct. Rev. 227, 264 (1985).

Professors' Brief at 12.

Stare decisis, of course, is not "a universal, inexorable command." Burnet, 285 U.S. at 405 (Brandeis, J.,

dissenting). Especially in constitutional cases, the Court has overturned prior decisions "to brings its opinions into agreement with experience and with facts newly ascertained." Id. at 412. Yet the Court has repeatedly insisted that "any departure from the doctrine of stare decisis demands special justification," Arizona v. Rumsey, 467 U.S. 203, 212 (1984):

> [E]very successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by stare decisis yield in favor of a greater objective.

Hillery, 474 U.S. at 266.

What kind of legal or social changes have proven sufficient to meet

the "heavy burden" placed on those who urge repudiation? In Hillery, the Court spoke of precedents that had become "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." 474 U.S. at 266. In his thoughtful early treatment of the question, Justice Brandeis observed that a constitutional decision predicated in greatest part upon factual assumptions could be discarded if "the decision . . . ha[s] been rendered upon an inadequate presentation of then existing conditions, [or if] . . . the conditions may have changed meanwhile." Burnet, 285 U.S. at 412 (Brandeis, J., dissenting).

Consistent with this observation, decisions that have overruled precedent

have tended to come: (i) when social conditions have changed substantially, see, e.g., Duren v. Missouri, 439 U.S. 357, 369-370 (1975) (overruling Hoyt v. Florida, 368 U.S. 57 (1961), on women's exemption from jury service); Harper v. Virginia Board of Elections, 383 U.S. 663, 667-69 (1966) (overruling Breedlove v. Shuttles, 302 U.S. 277 (1937), on constitutionality of poll tax under Equal Protection Clause); (ii) when the Court learns significantly more about the factual assumptions upon which it based its earlier decision, see, e.g., Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 950-54 (1982) (overruling Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908), on whether ground water is an article of commerce subject to federal regulation); Williams v.

Florida, 399 U.S. 78, 92-99 (1970) (overruling Maxwell v. Dow, 176 U.S. 581 (1900), and Thompson v. Utah, 170 U.S. 343 (1898), on whether a jury of twelve persons is constitutionally required); or (iii) when there has been a significant change in the legal doctrine that underpins the precedent, see, e.g., Ford v. Wainwright, 477 U.S. 399, 405 (1986) (ten years after this Court held that the Eighth Amendment requires special procedural protections in state capital sentencing proceedings, it overruled Solesbee v. Balkcom, 339 U.S. 9 (1950), which denied a state prisoner any federal right to procedural protection from execution while insane); Ake v. Oklahoma, 470 U.S. 68, 85 (1985) (twenty-three years after this Court held that the Sixth Amendment requires

the assistance of counsel in all state felony trials, it overruled United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953), which denied a state criminal defendant the right to psychiatric assistance for his defense). See generally Professors' Brief at 14-15.

We urge the Court -- before deciding whether to reconsider Booth and Gathers -- first to consider whether Huertas presents one of those truly "rare circumstances" which somehow justify a decision to overrule a recent precedent. Have social conditions changed significantly since 1989? Are there important facts about victim impact evidence that were not considered by the Court at the time it decided

Booth and Gathers? Has Eighth Amendment law governing capital sentencing been transformed in the past two years?

The clear answer to these questions is "no." The State of Ohio, the Solicitor General, and other amici for petitioner have not made their case. They cannot meet the "heavy burden" that this Court imposes on parties who seek to overturn settled precedent.

II. NO SUFFICIENT CIRCUMSTANCES EXIST FOR OVERRULING BOOTH V. MARYLAND AND SOUTH CAROLINA V. GATHERS.

The objections to Booth now raised by petitioner and amici in support of petitioner are entirely familiar ones. Indeed, each and every point now voiced in opposition to Booth was advanced less

than two years ago when this Court granted review in Gathers on the question whether Booth was rightly decided.

The simple reason why not a single new ground to overturn Booth has been advanced is that nothing has changed since Gathers that might legitimately require disregarding the claims of stare decisis. In particular:

1. The social conditions that Booth addresses remain unaltered. Though the story of this Court's modern capital punishment jurisprudence might be told in various ways, a central chapter in any account certainly would feature the Court's struggle with the

problem of impermissible bias in capital sentencing.

Less than eight weeks before Booth was decided, the Court grappled with a troubling brand of bias that can plague the administration of the death penalty: discrimination based upon the race of the victim. In McCleskey v. Kemp, 481 U.S. 279 (1987), the Court declined to strike down Georgia's capital punishment statute even though studies indicated that the race of the victim had been a determinative factor in jury decisions to impose the death penalty. Although the Court surely condemned capital sentencing based on arbitrary or capricious factors such as the victim's race, it reaffirmed its faith in procedural "safeguards designed to

minimize racial bias in the process." 481 U.S. at 313 (1987). See also id. at 315 n. 37 ("unprecedented safeguards in the special context of capital punishment . . . [that] ensure a degree of care in the imposition of the sentence of death that can be described only as unique").

By barring the use of victim impact evidence in capital cases (save in certain distinctive circumstances, see Booth, 482 U.S. at 507 n. 10), the Court in Booth adopted a practical and effective procedural safeguard to minimize precisely the kinds of dangers exposed in McCleskey. No one disputes that victim impact evidence might influence a jury to recommend a death sentence for reasons that would offend

the constitution. Such evidence might promote decision on the basis of the victim's race, or socioeconomic status, or character, or popularity, or upon the eloquence of a surviving family member, or upon countless other factors that fail to offer a "'principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not.'" Booth, 482 U.S. at 506 (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (opinion of Stewart, J.)). "Of course, our system of justice does not tolerate such [arbitrary or capricious] distinctions." Booth, 482 U.S. at 506 n. 8.

The salient fact is that the conditions that Booth was designed to address persist. There is no dispute

that impermissible victim-based bias in capital sentencing has been and remains a recognized danger. Neither petitioner nor any of the amici in support of petitioner purports to argue that society has so changed that the dangers of victim-based bias in the administration of capital punishment may safely be dismissed. At most, the Solicitor General -- acknowledging that it is an "undeniable fact that victim impact evidence may in some cases include improper or inflammatory evidence," SG Brief at 8 -- suggests that the Court abandon Booth's answer to the problem and opt instead for a largely undefined but doubtless less protective approach that would entail

some form of fact-specific case-by-case appellate review.

We are convinced that the approach sketched by the Solicitor General is far too unguided and fact-bound to serve as a clear and workable standard in a federalist system. Worse, the suggested case-by-case approach affords much too little protection against the often difficult-to-detect force of bias in a capital case.[1] But even if one grants

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[1] Booth itself illustrates that little real comfort comes from an appellate case-by-case review for possible victim-based bias. The Maryland Court of Appeals purported to conduct such a review in Booth under its statutory injunction -- similar to one in force in several other states -- to ensure that the death sentence "had not been imposed under the influence of passion, prejudice, or other arbitrary factors." See Booth v. Maryland, 482 U.S. 496, 501 (1987).

that a case-by-case approach is a plausible, albeit limited, check against the dangers associated with victim impact evidence, the short answer is that a majority of the Court made a reasoned and supported choice in Booth to require a demonstrably more protective safeguard, and a majority of the Court went on to reaffirm that choice in Gathers.

As with nearly all choices the Court makes, there is room for disagreement. But as Gathers itself reflects, a happy incident of stare

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And of course, appellate case-by-case review will do nothing to stop the unquestionably pernicious victim-based bias that operates in favor of some capital defendants -- those, for instance, "whose victims are perceived to be less worthy," id. at 506 n. 8.

decisis is that it prevents such disagreements from disrupting the law each time a new Justice joins the Court.

2. Booth is neither unworkable nor disruptive of the fair and orderly administration of justice. There is nothing in the collective experience under Booth to suggest that it is a failure that must be repudiated.

First, there is no reason to believe that Booth has impeded prosecutors from securing the imposition of even a single death penalty to which a state was legitimately entitled; since "Booth excludes from the capital sentencer's consideration only a very narrow class of evidence whose relevance is at least reasonably debatable, . . . most capital prosecutions would be the

same whether or not Booth had been decided." Professors' Brief at 23.[2]

Second, Booth is not generating the kind of significant "confusion" in the criminal justice system that might warrant the reconsideration of settled precedent. Indeed, if the few cases cited by amici in support of petitioner are illustrative, see WLF Brief at 18-20 & n. 34, it would seem that judges are suffering no difficulties of consequence in following Booth's direct teachings.[3]

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[2] Booth does not limit the prosecution's right to directly and logically rebut a defendant's showing in mitigation. Booth v. Maryland, 482 U.S. 496, 507 n. 10 (1987); United States v. Murphy, 30 M.J. 1040 (A.C.M.R. 1990) (en banc); Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989). See also Professors' Brief at 28-29.

[3] The Washington Legal Foundation cites Thompson v. Lynaugh, 821 F.2d 1080 (5th Cir. 1987), Bertolotti v. Dugger, 883 F.2d 1503

To say the least, a stronger showing must be made before a recently announced and recently reaffirmed decision of this Court is scuttled as an unworkable failure.

Third, to the extent that unanswered questions of application remain after Booth and Gathers, those questions appear to be neither numerous,

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(11th Cir. 1989), and United States v. Murphy, 30 M.J. 1040 (A.C.M.R. 1990) (en banc), as evidence of untoward confusion over Booth.

If confusion exists, it is not in the minds of the judges who decided these cases. The Thompson court found a procedural default and thus never reached the merits of the Booth issue. The Murphy and Bertolotti courts found no violation of Booth for readily understandable reasons; in each case, the evidence concerning the victim directly rebutted -- indeed, contradicted -- an aspect of the defendant's case in mitigation. See Booth v. Maryland, 482 U.S. 496, 507 n. 10 (1987).

nor pressing, nor especially difficult. In the main, such questions are likely to concern footnote 10 in Booth and its recognition that there are occasions when victim impact evidence might be relevant and admissible. These are derivative doctrinal questions which can and should be dealt with as all such questions normally are: in an orderly fashion. When the questions properly arise, the Court should answer them.[4]

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[4] We do not share the Solicitor General's sense of alarm over the possibility that Booth's rationale might be extended to support a challenge to the constitutionality of statutory aggravating circumstances that turn on the identity of the victim. See SG Brief at 9, 16-17, 20. The Solicitor General cites no case in which this has occurred, the dissenters in Booth were far from troubled by the prospect, see Booth v. Maryland, 482 U.S. 496, 517 n. 2 (1987) (White, J., dissenting), and the Solicitor General in any event concedes that "it is no doubt possible

Fourth, the criticism of Booth as a source of potential confusion and frustration for the criminal justice system is sure to be even more true for the case-by-case approach favored by petitioner and amici in support of petitioner. It is extremely doubtful that clear and articulable standards will emerge under a system of ad hoc review for the influence of victim-based bias.

3. Booth's continued existence does not threaten constitutional order. A constitutional rule like Booth does not affect, let alone limit or impede, the processes of democratically elected bodies. Nor will continued adherence to

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to distinguish" Booth should the need arise, SG Brief at 17.

Booth entrench any major constitutional principles that are subject to question.[5] Booth bars no prosecution for murder, forbids no state from responding to the ultimately immeasurable harm

[5] The constitutional principles implicated in Booth were settled then and remain settled now:

> Booth involved a particularized application of two settled constitutional principles. . . . The first principle called forward in Booth is one that was well settled: the individualized selection of those to be sentenced to death must turn upon an assessment of moral culpability. . . . The second principle called forward in Booth was also well-settled: to be reliable the capital sentencing process must be protected against the influence of arbitrary and capricious factors.

Professors' Brief at 24-26. See Thompson v. Lynaugh, 821 F.2d 1080, 1082 (5th Cir. 1987) (Booth "merely reiterates what the Supreme Court has previously held").

caused by a murderer by authorizing capital punishment, and forbids no sentencer from imposing the death penalty upon a reasoned evaluation of that murderer's personal moral culpability. As such, it is sheer exaggeration to say that Booth so fundamentally "disserves principles of democratic self-governance" as to merit being overruled, SG Brief at 9.

4. Huertas is an inappropriate case in which to reconsider Booth and Gathers. In addition to the fact that certiorari was not granted on a question calling for the repudiation of Booth and Gathers, another aspect of Huertas makes it an inappropriate case in which to discard these decisions. Ultimate resolution of the case need not turn on the application of either precedent.

To judge from the opinion below, two grounds for decision will remain without regard to Booth and Gathers. First, the victim impact statements employed in Huertas evidently are barred by the law of Ohio. See State v. Huertas, 51 Ohio St. 3d 22, 24, 553 N.E.2d 1058, 1063 (1990); State v. Sowell, 39 Ohio St. 3d 322, 327-28, 530 N.E.2d 1294, 1301-02 (1988); State v. Post, 32 Ohio St. 3d 380, 383-84, 513 N.E.2d 754, 757-59 (1987). Second, the Ohio Supreme Court's judgment rests independently upon a holding that it was error to admit evidence that the victim's father wished the defendant to suffer the death penalty. Huertas, 51 Ohio St. 3d at 26, 553 N.E.2d at 1064-65. The Solicitor General concedes that

such an opinion "ordinarily should not be admitted" and that the error may warrant reversal of Huertas' death sentence. SG Brief at 16 n. 8.

A decision to reconsider Booth and Gathers -- which would require the Court to reach beyond the narrower issues properly encompassed by the question presented in the petition for certiorari -- is accordingly neither necessary nor prudent.

CONCLUSION

Amici curiae respectfully urge the Court to affirm the judgment below.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(12)

No. 89-1944

MOTION FILED
DEC 17 1990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF OHIO,

Petitioner,

—v.—

EDIBERTO HUERTAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF MURDER VICTIMS' FAMILIES FOR RECONCILIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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No. 89-1944

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF OHIO,

Petitioner,

v.

EDIBERTO HUERTAS,

Respondent.

On Writ of Certiorari to the
Supreme Court of Ohio

**MOTION FOR LEAVE TO FILE BRIEF
AND BRIEF OF MURDER VICTIMS' FAMILIES
FOR RECONCILIATION AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

Pursuant to Rule 37.4 of the Rules of this Court, amici move for leave to file the attached brief amicus curiae in support of respondent Ediberto Huertas. A motion is required because petitioner has failed to consent to any amicus curiae

filing.

Murder Victims' Families for Reconciliation ("MVFR") is a national organization of more than one hundred families of murder victims dedicated to the development of effective methods for deterring homicide and for healing the injuries left by homicide. The director of the organization, Pat Bane, lives in Syracuse, New York, but member families reside in many other states. MVFR advocates for the families of homicide victims and for legislation supportive of these families.

MVFR is interested in this case, because it believes the rule of Booth v. Maryland, 482 U.S. 496 (1987), to be a rule that ultimately benefits homicide victims and their families. It believes that Booth assures that all homicide victims are treated with equal dignity, and that the loss of any life cannot and

should not be diminished because of the individual characteristics of the victim. Further, MVFR believes that the impact of a homicide upon the victim's survivors is not effectively addressed or redressed in capital criminal proceedings. Finally, MVFR believes that, without the Booth rule, survivors would be urged to present their loss and their grief in a forum particularly ill-suited to respond to them, yet holding our an illusory capacity to respond. In the long run, the healing process needed by survivors would be deferred.

Accordingly, MVFR requests that the Court hear its concerns on the issue whether Booth should be overruled.

Respectfully submitted,

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December 17, 1990

QUESTION PRESENTED

Should the Court overrule Booth v. Maryland?

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No. 89-1944

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF OHIO,

Petitioner,

v.

EDIBERTO HUERTAS,

Respondent.

On Writ of Certiorari to the
Supreme Court of Ohio

BRIEF OF MURDER VICTIMS' FAMILIES FOR RECONCILIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

The interest of amici is described in the motion for leave to file this brief.

SUMMARY OF ARGUMENT

Victims of crime and their survivors do not speak with a single voice. Here,

while a number of victims' advocates call on the Court to overrule its recent decisions in Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 109 S. Ct. 2207 (1989), amici -- who also represent victims -- urge adherence to the rule of these cases.

We do so out of concern that making victim impact evidence admissible in capital sentencing proceedings will often hurt, not benefit, victims. Departure from Booth would allow defendants to rebut proof of a victim's good character and her survivors' grief with evidence and argument contending that the victim was, in fact, neither good nor grieved. It would allow defendants to place their victims' character on trial even when the prosecution did not do so. Worse, by treating evidence about the victim's character and her family's sense of loss as relevant to capital sentencing even

though it does not bear upon the character or record of the offender or the circumstances of the offense, retreat from Booth and Gathers would demean victims as a class by encouraging sentencers to base decisions of life or death on factors such as race and social status.

ARGUMENT

THE USE OF VICTIM IMPACT EVIDENCE AT PENALTY TRIALS IN CAPITAL CASES THREATENS TO HARM INDIVIDUAL VICTIMS AND TO PROMOTE RELIANCE UPON INVIDIOUS DISTINCTIONS AMONG VARIOUS GROUPS OF VICTIMS IN THE CAPITAL SENTENCING PROCESS.

The narrow ground of the Ohio Supreme Court decision below and the particular facts of this case make it an improvident occasion to reconsider Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 109 S. Ct. 2207 (1989). The case can easily be resolved without addressing the continuing validity of those

precedents.[1]

Petitioner, however, does urge the overruling of Booth and Gathers as an alternative ground for reversal; and various amici have espoused that course. See Petitioner's Brief on the Merits 49-51; e.g., Brief of Washington Legal Foundation et al. as Amici Curiae in Support of Petitioner ("WLF Brief"); Brief for the United States as Amicus Curiae Supporting Petitioner ("US Brief"). It is, of course, apparent that a majority of the Justices of this Court have joined

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[1] See, e.g., Respondent's Brief in Opposition 3 n.1 (arguing that Ohio law pre-dating Booth, which prohibits victim impact evidence in capital cases, independently controls the decision below); Motion to Dismiss Certiorari as Improvidently Granted (arguing that Ohio law forbidding opinion testimony on the propriety of a particular sentence in a capital case provides a sufficient basis for decision); see generally Petition for Writ of Certiorari 21 (arguing that this case affords "a unique chance" for the Court to consider the role of victims in the criminal justice system "without overruling Booth or Gathers").

opinions critical of Booth. See Booth, 486 U.S. at 515-19 (White, J., dissenting); id. at 519-21 (Scalia, J., dissenting); Mills v. Maryland, 486 U.S. 367, 395-98 (1988) (Rehnquist, C.J., dissenting); Gathers, 109 S. Ct. at 2211-17 (O'Connor, J., dissenting); id. at 2217-18 (Scalia, J., dissenting).[2]

In light of these circumstances, if the Court fails to dispose of the case on narrower grounds, amici (who have themselves suffered the shattering effects of violent crime) wish to point out that concern for victims and their survivors provides no cause to abrogate the rule announced in Booth. Far from advancing victims' interests, the converse rule would constitute a step backward for "victims' rights" because allowing the

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[2] Justice Kennedy joined the Chief Justice's dissent in Mills and Justice O'Connor's dissent in Gathers.

kind of prosecution evidence and argument barred in Booth and Gathers would require allowing the same type of evidence and argument when they are offered by the defense.

Such permissiveness risks gratuitous harm to individual victims. It also threatens to inject distinctions of caste and class into the capital sentencing process. Thus, while amici have no interest in which party prevails in this matter, we file on the side of respondent Huertas since it is petitioner Ohio that invites the Court to overrule Booth -- a course of action we strongly oppose, for reasons more fully set forth below.

1. ABANDONMENT OF THE RULE OF BOOTH WOULD LEAD TO DEFENSE ATTACKS ON VICTIMS AND INFLICT ADDED PAIN ON SURVIVING FAMILY MEMBERS AND FRIENDS.

A bedrock tenet of modern capital punishment law is that the decision to impose death must both "'be, and appear to

be, based on reason rather than caprice or emotion.'" Zant v. Stephens, 462 U.S. 862, 885 (1983), quoting Gardner v. Florida, 430 U.S. 349, 358 (1977). This interest in sentencing rationality has mainly been served by the Court's insistence that the sentencing body (usually a jury) make an individualized determination grounded on the defendant's character and the circumstances of the crime. See, e.g., Stephens, 462 U.S. at 879; Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982).

By anchoring the choice of penalty to factors concerning the offender and the offense, the Court has sought to make the life or death decision turn on the "personal responsibility and moral guilt" of the defendant, Enmund v. Florida, 458 U.S. 782, 801 (1982), rather than on considerations "that are constitutionally impermissible or totally irrelevant to the

sentencing process." Stephens, 462 U.S. at 885. Although there is no perfect procedure for determining when to impose death, Lockett v. Ohio, 438 U.S. 586, 605 (1978), the Court has insisted that this general approach is indispensable to achieving the Eighth Amendment goal of a "reasoned moral response" by the sentencer. See, e.g., Saffle v. Parks, 110 S. Ct. 1257, 1263 (1990), quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original); Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989) (also quoting Brown concurrence). When "the jury's attention is directed to the specific circumstances of the crime ... [and t]he jury's attention is focused on the characteristics of the person who committed the crime ...'the [sentencing] discretion to be exercised is controlled by clear and objective standards so as to

produce non-discriminatory application.'" Gregg v. Georgia, 428 U.S. 153, 197-98 (1976) (opinion of Stewart, Powell and Stevens, JJ.).

The majority in Booth saw the principles it announced -- that information on victim impact is generally irrelevant to capital sentencing and "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner" -- as fitting comfortably within the ambit of the doctrines stated above. 482 U.S. at 502-03. The dissenting Justices disagreed. See, e.g., id. at 519-20 (Scalia, J., dissenting) (respecting relevance); id. at 517-18 (respecting arbitrariness). We concentrate, however, on other, largely non-divisive aspects of Booth to develop our point that sanctioning victim impact evidence will hurt more than help victims.

Those who would overturn Booth believe that its rule does a disservice to legitimate interests of victims. They contend that entitling the defendant to introduce all mitigating factors while forbidding the state to bring to the sentencing body's attention the full range of harms to the victim's family and friends and society at large, arising from the deceased's death, skews the picture presented to the sentencer[3] and is thus unfair to victims. See, e.g., Kilpatrick & Otto, Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning, 34 Wayne L. Rev. 7, 27 (1987); Henderson, The Wrongs

[3] See, e.g., id. at 520-21 (Scalia, J., dissenting); Gathers, 109 S. Ct. at 2214 (O'Connor, J., dissenting); Motion for Leave to File Brief of Amicus Curiae in Support of the Appellate Committee of The California District Attorneys Association at 9; US Brief 17-18 &n.10.

of Victim's Rights, 37 Stan. L. Rev. 937, 1002 (1985) ("Henderson") (commenting on, but not sharing, this viewpoint).

At first blush, this seeming imbalance may appear troubling. But further reflection reveals that the symmetry envisioned by Booth's opponents is false. A true symmetry, already built into the penalty trial, arises from the prosecution's ability to "counteract[] the mitigating evidence," see Booth, 482 U.S. at 517 (White, J., dissenting), not by dwelling on the deceased's unique qualities but by offering evidence and argument impugning the case in mitigation -- as the state did in the instant case. See State v. Huertas, 51 Ohio St.3d 22, 25-26 &n.2, 553 N.E.2d 1058, 1064 &n.2 (1990).[4]

[4] As Judge Kravitch correctly noted in Moore v. Zant, 722 F.2d 640, 651 n.1 (11th Cir. 1983) (Kravitch, J., concurring in part and dissenting in part), on reh'g

More important from our perspective, the converse rule would be worse for victims. Hyperbole about the purported promotion by Booth and Gathers of defendants' rights over victims' rights, see, e.g., WLF Brief 2, 15, cannot conceal the fact that, in an adversary system such as ours, abandonment of Booth will inevitably lead to critical scrutiny of

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en banc, 809 F.2d 702, cert. denied, 481 U.S. 1054 (1987):

> The [victim impact] evidence at issue may not be fairly characterized as properly rebutting the mitigating evidence offered by the defendant in his bid for jury sympathy. For the victim's qualities have nothing to do with whether the circumstances of the defendant's life militate in favor of leniency. Rather, they provide an independent, albeit invalid, basis for a harsher sentence.

Of course, the state may also counter the defendant's evidence by introducing all pertinent valid aggravating factors: i.e., those that genuinely bear on "the defendant's record, characteristics, and the circumstances of the crime." See Booth, 482 U.S. at 502.

victims' lives -- their characters, attributes and human relationships. Members of the Court on both sides of Booth readily acknowledged that evidence about victims cannot be admitted at the behest of one litigant and excluded whenever offered by the other. "[I]f the state is permitted to introduce evidence of the victim's personal qualities, it cannot be doubted that the defendant also must be given the chance to rebut this evidence." Id. at 506-07 (footnote omitted), citing Gardner v. Florida, 430 U.S. 349 (1977); see also id. at 518 (White, J., dissenting); Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986); id. at 9 (Powell, J., concurring in the judgment). Due process demands no less.

Since admitting proof of a victim's goodness and her relatives' pain on account of her loss must logically entail admitting proof of a victim's badness and

her relatives' indifference to her demise, amici urge the Court not to upset the rule of Booth prohibiting all such evidence.[5] "The prospect of a 'mini-trial' on the victim's character is more than simply unappealing" or distracting to jurors, as the majority in Booth noted. 482 U.S. at 507. It is also demeaning to the victim's memory and therefore should be offensive to those who truly have victims' interests at heart.

The fact that some defendants may not wish to rebut victim impact evidence for

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[5] Under traditional evidentiary principles which are left untouched by Booth, the victim's attributes may be relevant at the guilt or penalty phase for some purpose other than to show that the defendant deserves to die because the deceased was a fine person or left grieving parents or children. In those circumstances, proof of the relevant characteristics is, of course, admissible. See id. at 507 n.10; Moore, 722 F.2d at 651 (Kravitch J., concurring in part and dissenting in part); see, e.g., Fed. R. Evid. 404(2) (giving instances in which the victim's character is independently relevant).

tactical reasons, see Brief of Amicus Curiae, The State of California, in Support of Petitioner 17-18; Booth, 482 U.S. at 518 &n.3, should not obviate concern over the adverse effects on victims in general of abandoning Booth. For it will be precisely when a victim's life has not been unimpeachable that defense counsel will be likely to risk impeaching it. And just as Booth laid down a doctrine of constitutional irrelevance for evidence of this nature when offered solely to enhance the defendant's "deathworthiness" in the eyes of the jury, the converse rule would establish a new definition of relevance in capital sentencing -- unanchored in the traditional moorings of the offender's character and record and the circumstances of the offense -- which would itself assume constitutional dimensions. That conclusion flows from the indisputable

right of the accused to offer pertinent evidence in her defense, whether at a guilt trial, see, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973); Rock v. Arkansas, 483 U.S. 44 (1987), or a capital penalty proceeding. See, e.g., Green v. Georgia, 442 U.S. 95 (1979).

Accordingly, since the same principle that makes a victim's moral and familial worthiness relevant evidence in aggravation makes his moral and familial worthlessness relevant evidence in mitigation -- "in the sense that [it] might serve 'as a basis for a sentence less than death,'" Skipper, 476 U.S. at 4-5, quoting Lockett, 438 U.S. at 604[6] --

[6] While five members of the Court may now have come to believe that "[s]tates are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty,'" Boyde v. California, 110 S. Ct. 1190, 1196 (1990); cf. Franklin v. Lynaugh, 487 U.S. 164, 181 (1988) (plurality opinion), the Court continues

defendants in a post-Booth era would have free rein to assassinate the characters of the dead even in cases in which the state has made no effort to extol their characters. Judicial attempts to shield individual victims against this sort of disparagement would merely spawn constitutional litigation without offering any real protection. See Olden v. Kentucky, 488 U.S. 227, 232 (1988).

Besmirching the memory of the deceased whenever possible would become an unavoidable, if highly distasteful, obligation of competent defense attorneys. The interests of victims would scarcely be served by inaugurating a new regime in which lawyers might risk being held

to adhere to the Eighth Amendment tenet that the jury must "be able to consider and give effect to all relevant mitigating evidence." See Boyde, 110 S. Ct. at 1196 (citations omitted); Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990).

constitutionally inadequate unless they attempted to prove "that the victim was of dubious moral character, was unpopular, or was ostracized from his family," and thus unmourned. Booth, 482 U.S. at 507; cf. Bolder v. Armontrout, 713 F. Supp. 1558, 1568-69 (W.D. Mo. 1989) (in a post-Booth case, the court rejected a claim of ineffective assistance based on counsel's failure to offer proof of the victim's propensity for violence and bad character because the proof would have been inadmissible).[7] Equally, those needs would be ill served by changing the law so as to encourage lawyers "to argue the victim's worthlessness in mitigation," see Moore, 722 F.2d at 653 n.4 (Kravitch, J.,

[7] Indeed, under this new order, a prosecutor would presumably incur a duty under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Bagley, 473 U.S. 667 (1985), to provide the defense with all information of conceivable use in attacking the victim.

concurring in part and dissenting in part), or to demand that sentencing jurors be instructed to consider -- as mitigating factors -- the chronic unemployment, lack of friends, or financial dishonesty of the deceased.

While other amici seem to regard with equanimity the notion that "[a]n individual convicted of murdering a drug dealer, for example, could make a reasonable claim in mitigation that his act actually benefited society by ridding the community of a merchant of violence and death," WLF Brief 17, we do not. As victims' advocates, we believe that sentencers should focus on the offender's culpability rather than try to assess the "relative blameworthiness" of the person killed, see Henderson at 991, in cases in which the latter's qualities shed no light upon the offense. We therefore urge the Court to keep the lid on the Pandora's box

of evidence of victims' moral and familial worth.

This preference not only jibes with victims' interests but also is consistent with long-established doctrine. Far from being required to be admitted at the defense's behest by the Eighth Amendment or due process, such evidence -- when offered by prosecutors or defendants -- was routinely barred under local law even prior to Booth. See, e.g., People v. Levitt, 156 Cal. App.3d 500, 517, 203 Cal. Rptr. 276, 288 (1984) (state's evidence of family's bereavement held irrelevant); Henderson v. State, 234 Ga. 827, 828, 218 S.E.2d 612, 614 (1975) (in general, evidence of deceased's character is inadmissible at murder trial); State v. Oliver, No. 49613 (Ohio Ct. App. Oct. 17, 1985) (LEXIS, States library, Ohio file) (state's evidence of victim's niceness and intelligence and defense evidence of

victim's homosexual acts both held inadmissible); State v. Gaskins, 284 S.C. 105, 128, 326 S.E.2d 132, 145, cert. denied, 471 U.S. 1120 (1985) (no error in excluding confession of victim, a death-sentenced murderer, proffered by defense since victim's status "did not entitle [defendant] to kill him").

A number of states have passed legislation in the last decade authorizing or mandating victim impact statements. Although this fact reflects some change in the sentiment that a defendant's sentence should not be enhanced because of "the perception that the victim was a sterling member of the community," see Booth, 482 U.S. at 506, there has been no parallel change in the view that a victim's "questionable character," id., should not

operate to lessen a sentence.[8] Legislatures may act in such a one-sided fashion, but constitutional rules cannot. While Booth's dissenters recognized the theoretical possibility that defense lawyers would introduce "bad victim" evidence, they seemed to consider that prospect remote -- perhaps because they did not focus on the use of such evidence other than in response to the state's "good victim" evidence. See id. at 518 & n. 3 (White, J., dissenting).[9] No one on

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[8] For a list of some of these statutes, see Lodowski v. State, 302 Md. 691, 744-45 &n.3, 490 A.2d 1228, 1260 n.3 (1985), vac'd, 475 U.S. 1078 (1986) (Cole, J., concurring) (listing such statutes). See also Comment, The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions, 77 Calif. L. Rev. 417, 427 (1989). Notably, even before Booth, several jurisdictions excluded capital penalty trials from the ambit of such laws. See, e.g., O.C.G.S. §§ 17-10-1.1, 17-10-1.2 (1990); (Ga.); Okla. Stat. Ann. tit. 22, § 982 (1986).

[9] The prospect is, in fact, far from remote. Bobby Lee Cook, the well-known criminal lawyer who has defended more than

the Court has suggested approval of the type of mitigating claim envisioned by the Washington Legal Foundation to the effect that service in the role of private executioner of drug dealers might militate against death for the killer. See supra at 18-19. Yet since such victim-denigrating arguments would predictably follow repudiation of the rule of Booth (and would undoubtedly be employed against non-criminal victims as well if they possessed tarnished, rather than sterling, characters), a sober appraisal of victims'

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350 murder cases is quoted as saying that the jury has two concerns in a murder case. "'Number one, should the victim have been killed? Did he deserve to die? ... And secondly, was your man the right man for the job?'" Curriden, Bobby Lee Cook -- Georgia Maverick, A.B.A.J. 68, at 68 (Mar. 1989). While these considerations may be legally relevant at the guilt stage in some homicide cases, such as those involving a claim of self-defense, the overruling of Booth would encourage defense lawyers to act upon them in all cases -- whether they are legally relevant or not.

interests plainly calls for the rule's retention.

Finally, even when victims have lived unimpeachable lives, and friends and relatives have little reason to fear attack on the memory of their loved one, overruling Booth would still threaten survivors with unnecessary pain. Indeed, especially in such cases, prosecutors can be expected to pressure persons close to the victim to take the stand and testify to the deceased's "outstanding personal qualities" and to how deeply she would be missed. See Booth, 482 U.S. at 499. At the very least, the state's attorney will invite if not importune such testimony -- thereby creating in many individuals a sense that they owe the victim an obligation to speak, whether or not they want to do so.

While some survivors will regard the experience as cathartic, others will not.

See Henderson at 979-80. The latter may wish to avoid appearing at trial at all or, in the case of those who have to give evidence at the guilt phase (like Mrs. Harris, the mother here), avoid reappearing at the penalty stage. For reluctant witnesses,[10] the need to dwell yet again on their loss will only lead to renewed suffering and impede the healing process.

And even survivors who are willing to attend court proceedings and dredge up their pain for the jury may find that they must compete as "victims" with family

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[10] The record suggests that Mrs. Harris was such a witness. See, e.g., Victim's Statement in Presentence Investigation (J.A. 162) ("the victim's parents stated they are tired of rehashing over [sic] the details and wished that people would leave them alone"); Testimony of Mrs. Harris at Penalty Trial (J.A. 137) (in response to mother's emotional outburst, defense counsel conceded: "I know you don't want to talk about it any more ...."); Trial Record 11 (in sidebar, prosecutor mentioned pressure by the victim's family to offer a plea).

members of the defendant, mourning the potential execution of their son or grandson, father or brother. See, e.g., Brooks v. Kemp, 762 F.2d 1383, 1439 (11th Cir. 1985) (en banc), vac'd, 478 U.S. 1016 (1986) (in penalty summation, prosecutor compared suffering of victim's and defendant's families).[11] If Booth is overruled, so too will be those decisions

[11] In Booth, the defendant delivered an allocution to the jury emphasizing the "terrible effect" of the criminal proceeding on him and his family: the attempted suicide of his wife, his grandfather's death, and his grandmother's anticipated death if he were sentenced to be executed. See Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. In Support of Petitioner, Booth v. Maryland, 482 U.S. 496 (1987). In a variation on this theme, Huertas's counsel elicited from the victim's mother at the penalty trial that respondent's grandparents (who had raised him) were terribly hurt because of "what their son did to [her] son." (J.A. 135) The prosecutor then brought out that the victim's death could not have hurt Huertas's family as much as her "because they still have Eddie; and I don't have Ralph" -- in this fashion, expressly creating a contest of grief between the families. (J.A. 143)

in which courts wisely rejected proof of familial sorrow on the side of the defendant as well as the victim -- so long as, in the former case, the proof was not tethered to genuinely mitigating evidence about the defendant's better characteristics. Compare Coppola v. Commmonwealth, 220 Va. 243, 257 S.E. 2d 797 (1979), cert. denied, 440 U.S. 1103 (1980) (court held irrelevant and inadmissible evidence of the adverse effects on defendant's children of his prosecution for capital murder) with Grant v. State, 703 P.2d 943, 945-47 (Okla. Crim. App. 1985) (prosecutor's statement that victim left an eleven-year old daughter held error, though harmless); cf. People v. Erickson, 117 Ill.2d 271, 303-04, 513 N.E.2d 367, 381 (1987), cert. denied, 486 U.S. 1017 (1988) (Booth supports conclusion that trial court properly refused to consider feelings of

defendant's family in imposing sentence).

In sum, from the vantage of many individual victims (and their survivors, who care for them), the rule of Booth safeguards both the memory of the dead and the feelings of the living. We now proceed to show how Booth also protects victims in general, and the moral integrity of capital sentencing, by reducing the risk that sentencers will make invidious distinctions among various groups of victims in determinations of penalty.

2. ABANDONMENT OF THE RULE OF BOOTH WOULD LEAD TO INCREASED CONSIDERATION, AS A SENTENCING FACTOR, OF THE CLASS, CASTE, AND RACE OF VICTIMS.

As Justice O'Connor remarked in California v. Ramos, 463 U.S. 992, 1000 (1983), "It would be erroneous to suggest ... that the Court has imposed no substantive limitations on the particular

factors that a capital sentencing jury may consider in determining whether death is appropriate." In Zant v. Stephens, supra, handed down in the same Term, the Court specified that states may not encourage sentencers to rely on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant." 462 U.S. at 885 (citation omitted); McCleskey v. Kemp, 481 U.S. 279, 291 n.8 (1987). See, e.g., Turner v. Murray, 476 U.S. 27 (1986) (recognizing grave risk of hidden operation of racial prejudice in capital sentencing).

This prohibition naturally extends to related criteria like social status (a point conceded by the state in Booth). Brooks, 762 at 1409; see Brief for Respondent, Booth v. Maryland, 482 U.S. 496 (1987), at 36-37. By the same token,

the ban covers the use of such considerations as applied to victims rather than defendants. See, e.g., McCleskey, supra (discrimination in capital sentencing on basis of the victim's race would be unconstitutional). These conclusions are grounded in history as well as logic: the framers of the Fourteenth Amendment were especially anxious both to eradicate distinctions based on "class" or "caste" and to confer on everybody the equal protection of the criminal laws.[12] Thus, although the Court in Booth divided over the degree of the

[12] To the congressmen who approved the amendment, the recently-abolished institution of slavery provided an extremely vivid example of a system that failed to furnish the most elementary protections, including those of life or limb, to a group defined by race and caste. For a discussion of the original meaning of the equal protection clause, see Brief Amici Curiae of the NAACP Legal Defense and Educational Fund, Inc. and the American Jewish Congress, South Carolina v. Gathers, 109 S. Ct. 2207 (1989) ("LDF and AJC Gathers Brief"), at 10-29.

risk that the Maryland procedure calling for victim impact evidence might invidiously influence sentencers, no member of the Court suggested that actual reliance on forbidden factors would be constitutionally permissible. Compare id. at 502 with id. at 517 (White, J., dissenting).

Yet overturning Booth and Gathers would, in fact, increase the danger of jurors deciding to impose death "because of who the victim was," not only in some idiosyncratic personal sense but also in broad societal terms. See Moore, 722 F.2d at 651 (Kravitch, J., concurring in part and dissenting in part) (emphasis in original). Writing for the majority in Booth, Justice Powell put his finger on the nub of the problem: "We are troubled by the implication that defendants whose victims were assets to the community are more deserving of punishment than those

whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions." Id. at 506 n.8 (citation omitted) (emphasis added). The reason it does not is that the system (and indeed, our whole government) rest on the fundamental premise of political equality for all persons. See Cong. Globe, 39th Cong., 1st Sess., at 257 (1866) (Statement of Senator Clark), quoted in LDF and AJC Gathers Brief 27-28. This ideal will inevitably be betrayed, to victims' detriment, by the real-life operation of a rule placing a premium on "who the victim was."

That is so because, when asked to sympathize with victims and family members, sentencers will tend to sympathize more with people who resemble themselves. In the words of Judge Hampton of the Texas District Court: "'When a white is killed, the whites are upset.

When a black is killed, the blacks are upset. When a homosexual is killed of course the homosexuals are upset.'" Belkin, Texas Judge Eases Sentence For Killer of 2 Homosexuals, N.Y. Times, Dec. 17, 1988, § 1, at 8, col. 5. ("Belkin"); see generally Hayes v. Lockhart, 869 F.2d 358, 364 (8th Cir.) (Heaney, J., dissenting from denial of reh'g en banc), vac'd, 109 S. Ct. 3181 (1989) (prosecutor made personal appeals to several individual jurors, referring to their own families, in order to promote identification with victim's family).

Although perhaps most widely acknowledged with respect to race,[13] the

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[13] See, e.g., Pillsbury, Emotional Justice: Moralizing the Passions of Criminal Punishment, 74 Cornell L. Rev. 655, 708 (1989) (describing McCleskey statistics as illustrative of the "familiar psychological tendency [of] predominantly white decision makers ... to sympathize more with whites than blacks"); Kennedy, McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court, 101

phenomenon of certain crimes being taken less seriously because of who the victim is also occurs in relation to other status variables. Prostitutes who have been "beaten senseless by pimps or 'johns,' drug addicts mugged and robbed of their fixes," see Henderson at 951, unemployed drifters, homeless persons, and religious and political dissidents may not be regarded as true victims, or their assailants as real criminals deserving of significant punishment, by judges and jurors who are typically white and middle-

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Harv. L. Rev. 1338, 1420 (1988) ("race-of-the-victim disparities in sentencing probably reflect racially selective empathy"); see also Carter, When Victims Happen to Be Black, 97 Yale L.J. 420 (1988); Dane & Wrightsman, Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts, in The Psychology of the Courtroom 104-06 (1982). The effect may be exaggerated when the victim is of the same race, and the defendant is of a different race, from that of the jurors. See, e.g., id. at 106 (such situations result in the most severe punishment of the defendant).

class. Indeed, Judge Hampton, quoted above, unabashedly admits that he sentences according to the victim's perceived societal worth. Explaining why he had given a relatively lenient term to a man who killed two homosexuals, the judge remarked: "'I put prostitutes and gays at about the same level ... and I'd be hard put to give somebody life for killing a prostitute.'" Belkin, supra.

The use of victim impact evidence exacerbates in at least two ways the problems exemplified by Judge Hampton's sentencing approach. First, such characteristics as the articulateness of surviving relatives often correlate closely with social position and wealth, thereby serving as surrogates for factors no one believes ought to influence capital sentencing. Second, the content of this evidence, and of summations drawing upon it, strongly encourages juries to weigh

the deceased's value to the community. That value, in jurors' eyes, will tend to vary with caste and class as well as connected circumstances like education and employment -- and frequently, too, with race or religion.

Contrary to other amici's claims, see, e.g., WLF Brief 12-13, these dangers are hardly speculative. If they were, the reported cases would not reveal so many examples of divisive appeals to just these types of considerations.

Thus, we see prosecutors urging that the victim was a "'hard-working woman in a family-run business,'" Morrison v. State, 551 So.2d 435, 439-40 (Ala. Crim. App. 1989), cert. denied, 110 S. Ct. 1938 (1990), died his "'[f]irst day on the job trying to support his family,'" Hayes, 869 F.2d at 363 (Heaney, J., dissenting from denial of reh'g en banc), was a "'steady'" and "'[d]ependable'" employee, Byrne v.

Butler, 845 F.2d 501, 510 (5th Cir.), cert. denied, 487 U.S. 1242 (1988), or a "'good provider and family man,'" Hill v. Thigpen, 667 F. Supp. 314, 341 (N.D. Miss. 1987), as modified on denial of reh'g and reh'g en banc, 891 F.2d 89 (5th Cir. 1989), vac'd, 111 S. Ct. 28 (1990), or had received a college scholarship and was working her way through school to become a nurse. See Moore, 722 F.2d at 644.[14] In

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[14] See also Clemons v. Mississippi, 110 S. Ct. 1441 (1990) (prosecutor's argument):

> Here you have a man twenty-four years of age, in the prime of life. A three year-old child. Holding down two jobs. Trying to make it in this world as an honest, law abiding human being for his family. Trying to -- aspiring to be a supervisor in another county .... VII Record on Appeal 1192.
>
> * * *
>
> You will have the pictures of Arthur Shorter as he appeared on the day of April 17th. They don't depict exactly the personality of Arthur Shorter. Only those friends and people that knew Arthur Shorter

an expressly invidious vein, one also encounters prosecutorial attempts to exploit the religiosity of the deceased, see Gathers, the "'religious moral fiber'" of his mother, People v. Holman, 103 Ill.2d 133, 167-68, 469 N.E.2d 119, 135 (1984), cert. denied, 469 U.S. 1220 (1985), or the fact that he served as an Army chaplain. See Daniels v. State, 561 N.E.2d 487 (Ind. 1990) (prosecutor mounted

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> can tell you whether he was a good person. But we can look at what Matthew Shorter told us of his son. That he worked two jobs. He had a degree from Alcorn University. He was striving to get a higher education. And he had a son, a three year old son.
>
> Of course, Mr. Shorter and Candy Shorter won't have their son any more. Mr. Shorter probably worked throughout his life. He is a retired pulpwood man as he told you. He had worked all his life hard, raised fourteen children. And he has tried to instill in them the work ethic. And I think if you look at what he told you Arthur was doing, I think you can say that he properly instilled that work ethic in Arthur. Id. at 1168.

life-size photo of the victim in full military uniform and stressed that deceased had been a clergyman).[15] Similarly, one reads of prosecutors making arguments designed to encourage jurors to distinguish between ostensibly "'good immigrants,'" such as the victim (of Irish descent), and immigrants from disfavored backgrounds, such as the defendant (a Marielito). See Blanco v. Dugger, 691 F. Supp. 308, 322 (S.D. Fla. 1988).

Defense counsel would employ the same tactics if given the chance. In State v. Oliver, supra, for example, the defense sought to introduce specific instances of the deceased's homosexual activity; in State v. Butler, 277 S.C. 452, 290 S.E.2d

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[15] In the present case, the victim's mother testified at the penalty trial to the deceased's churchgoing habits. (J.A. 133) The Victim's Statement in the Presentence Investigation mentioned that the mother is "very religious." (J.A. 162)

1, cert. denied, 459 U.S. 932 (1982), the defense tried to tarnish the victim, a young white woman, by adducing proof of her social and sexual relations with blacks. See Brief of the South Carolina Public Defenders' Association and the South Carolina Death Penalty Resource Center as Amici Curiae in Support of Respondents, South Carolina v. Gathers, 109 S. Ct. 2207 (1989), at 42-44 (discussing facts from trial record not contained in reported decision). Appropriately, in both cases, the trial court refused to admit this irrelevant and prejudicial evidence. Yet in a post-Booth regime, that option would be foreclosed -- and victims, and those who loved them, would suffer.

Not surprisingly, opponents of Booth, faced with these facts, have little to rely on beyond truisms to the effect that equality can never be fully attained in

the criminal process. See WLF Brief 12. Our point, of course, is not that capital punishment systems should be brought to a halt unless they can achieve perfection in this or any other area, see McCleskey, 481 U.S. at 319, but rather that states should not be allowed to operate their systems under permissive rules of evidence that increase the risk of sentencers' basing verdicts of death on prohibited considerations, without very good reason to do so.[16] Here no such reason exists.

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[16] Thus, the rule of Booth has demanded no major changes in capital procedures. Cf. McCleskey, 481 U.S. at 367 (Stevens, J., dissenting) (majority seemingly feared that "acceptance of [defendant's] claim would have sounded the death knell for capital punishment in Georgia"); Lockhart v. McCree, 476 U.S. 162 (1986) (acceptance of defendant's claim would would have required that different juries be empaneled at guilt and penalty trials).

In addition, the Washington Legal Foundation argues from the facts of the present case that jurors who have heard victim impact evidence can nonetheless impose death even "when the victim is not

To the contrary, any suggestion that some lives count for more because their possessors were white, pious, socially respectable, or heterosexual would necessarily imply that others count for less because their possessors were black, irreligious, disreputable or homosexual. It is troubling enough if a lower-court judge espouses such views, see supra at 34; it would be intolerable if this Court, however inadvertently, lent them support. Apart from sending a message that is totally at variance with our traditions, departure from Booth would discourage friends and relatives of victims (who are

---

wealthy or socially prominent." WLF Brief 12. We do not contend, however, that such evidence invariably taints the sentencing process so as to bar death for killers of ordinary people -- simply, that it has the pernicious tendency to heighten the influence of status factors and worse, still, considerations of race and religion. (Notably, here, the religiosity of the deceased and Mrs. Harris may have affected the penalty verdict.)

disproportionately represented among society's least fortunate, especially poor and minority persons) from cooperating with the authorities investigating and prosecuting murders.

The irony of that result underscores our general point: not all victims' rights proposals actually advance victims' interests. In the words of Professor Lynne N. Henderson, herself a victim of violent crime, many "are problematic at best and may actually be psychologically destructive to the victim." Henderson at 938 n.3, 954-55. At least in the setting of capital cases -- where the high stakes provide incentives to both sides to employ every available gambit -- educated concern for victims counsels a skeptical approach to rules that foster often unwelcome scrutiny of the dead and their survivors. The fact that the rule of Booth protects against such unwarranted and harmful

intrusion strongly argues for its retention.[17]

CONCLUSION

Booth and Gathers balance the rights of defendants and victims in a fair and appropriate manner. Whatever the Court's disposition of this matter, those decisions should be reaffirmed.

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December 15, 1990

[17] There exist effective ways to aid victims that do not carry such grave potential to backfire against the "protected" class. See generally Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 et seq. (1982) (inter alia, granting victim right to receive physical protection and restitution from the defendant as well as pertinent information from the authorities).

AMICUS CURIAE

BRIEF

MOTION FILED
DEC 17 1990

(13)

No. 89-1944

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF OHIO,
Petitioner,

v.

EDIBERTO HUERTAS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1989

No. 89-1944

STATE OF OHIO,
Petitioner,

-vs-

EDIBERTO HUERTAS,
Respondent.

ON WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Pursuant to Rule 37.4 of the Rules of this Court, a*mici* respectfully move for leave to file the attached brief a*mici curiae* in support of respondent. Respondent has requested this brief and consented to the filing, but petitioner's counsel of record has refused to consent or to return counsel's telephone messages, thus necessitating a motion.

The interests of a*mici* are substantial. The National Association of Criminal Defense Lawyers and its affiliated chapter the Ohio Association of Criminal Defense Lawyers, represent capitally charged and death sentenced individuals on a regular basis. In particular, the membership of the O.A.C.D.L. is

composed of many public defenders including counsel for respondent, as well as hundreds of criminal defense lawyers in private practice. The combined experience of the prosecution and defense bar in the daily practice of criminal law before the trial courts is in large part responsible for the the manner in which criminal justice is administered in Ohio.

Participation of *amici* will be of assistance to the Court. *Amici* bring the perspective of the practicing defense bar to this case and a particularized knowledge of the legislative history of the pertinent statutes.

WHEREFORE, *amici* request this Court grant them leave to file a brief in support of respondent.

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INTEREST OF AMICI

The National Association of Criminal Defense Lawyers (N.A.C.D.L) is a District of Columbia non-profit corporation whose membership is comprised of more than 5,000 lawyers who are citizens of every state. Members serve in positions bringing them into daily contact with the criminal justice system as advocates, law professors, or judges of state or federal courts. The N.A.C.D.L. is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the N.A.C.D.L. as an affiliated organization and awards it full representation in the ABA House of Delegates. The N.A.C.D.L. is dedicated to the preservation and improvement of our adversary system of justice.

The *Amicus Curiae* Committee of the N.A.C.D.L. has discussed this case and decided that this issue is of such importance to defense lawyers throughout the nation that N.A.C.D.L. should offer its assistance to the court.

The Ohio Association of Criminal Defense Lawyers (O.A.C.D.L.) is a statewide organization of more than eight hundred (800) attorneys, both public and private, who practice primarily in the area of criminal defense law. The organization is affiliated with the N.A.C.D.L. and has been formed for charitable, scientific and educational purposes including the proper administration of justice and research in the field of criminal defense law.

The Legislation Committee of the O.A.C.D.L. works with the Ohio General Assembly on a daily basis. Without the O.A.C.D.L. there would be virtually no point of view expressed during the legislative process other than that of the Ohio Prosecuting Attorneys Association and the various law enforcement groups.

Because of this experience, the O.A.C.D.L. is uniquely situated to present the legislative history of the "victims' rights" bills which have been introduced in the Ohio General Assembly. This legislative history reveals the intent of the Ohio General Assembly and should be of assistance to this Court in resolving the question presented.

WHEREFORE, a*mici* respectfully present this brief in support of respondent to this Court.

THE QUESTION PRESENTED FOR REVIEW:

Does the decision of the court below rest on adequate and independent state grounds?

SUMMARY OF ARGUMENT

The Ohio General Assembly has on at least three (3) separate occasions considered and expressly rejected authorization of victim impact statements or testimony by victims during the sentencing phase of a capital trial. This has long been the rule in Ohio even before the General Assembly addressed the issue. Therefore, it comes as no surprise that the death sentence in the case at bar was reversed due to the introduction of inadmissible and highly prejudicial evidence.

Nor is Ohio unique in its determination not to allow such evidence during the capital sentencing process. Of the thirty-six (36) states with death penalties, nineteen (19) states do not permit victim impact evidence at a sentencing hearing, twelve (12) make admission discretionary with the trial judge and only five (5) mandate consideration. Ohio's legislative history is, in this respect, an instructive example.

The existence of adequate and independent state grounds for the decision make this case an inappropriate vehicle to work a change in established precedent. Whether and when victim impact evidence may be constitutionally permissible are questions best left for a case arising out of one of the states with a law expressly permitting it in the first place. In this case, any opinion on the federal question would be merely advisory and would not effect the outcome of the litigation.

This Court has established rules to avoid deciding Constitutional questions when the case can be resolved on another issue. The federal constitutional issue in this case is *dicta*. The central holding of the Ohio Supreme Court is based on a state rule of evidence. The result of this case will be unaffected by any decision this Court makes with respect to *Booth v. Maryland*, 482 U.S. 496 (1987)

and *South Carolina v. Gathers*, _U.S. _, 109 S. Ct. 2207 (1989). Therefore, the Constitutional issue should be avoided altogether.

ARGUMENT

I. THE DECISION OF THE COURT BELOW RESTED ON ADEQUATE AND INDEPENDENT STATE GROUNDS

The Ohio Supreme Court reversed Ediberto Huertas' sentence of death because the state introduced irrelevant and highly prejudicial evidence at the sentencing hearing. The prosecution did this in direct contravention of both case and statutory law. Not only is the, "admission of victim impact evidence at capital trials [...] not expressly permitted by the Ohio statutes.", *State v. Huertas*, 51 Ohio St. 3d 22, 24, 553 N.E.2d 1058, (1990), but also, a review of the legislative history of these statutes reveals the intent of the Ohio General Assembly to specifically exclude such evidence.

A. LEGISLATIVE HISTORY

During the regular session of the 115th General Assembly (1983-84), Senator Pfeiffer introduced Senate Bill No. 172 (140 v S 172). See Appendix A. The pertinent parts of Senate Bill No. 172 as introduced would have amended Ohio's capital sentencing statutes to require that the sentencer in a capital case, "shall consider the victim impact statement prepared pursuant to Section 2947.051 of the Ohio Revised Code", and that the sentencing body, "shall hear any evidence relevant to sentencing that is presented by the victim's family [...]." See Senate Bill No. 172 as introduced, *infra* at 39. Further, this bill would have required the sentencing body to weigh the victim impact statement and the evidence presented by the victim's family as well as the aggravating circumstances against the mitigating factors. If the former were found to outweigh the

latter the jury would have been required to recommend death. See Senate Bill No. 172 *infra* at 40. In point of fact, the only changes Senate Bill No. 172 proposed to make in Ohio's capital sentencing statutes related to the admission of victim impact statements and victim testimony during the sentencing phase of the capital trial. See Senate Bill No. 172 *infra* at 41-42, in addition to sections previously cited.

These changes in the law were never made. Senate Bill No. 172 as enacted deleted all references to Ohio's capital sentencing statutes. See Appendix B, *infra* at 74. Senate Bill No. 172 as enacted allowed and in fact required victim impact statements to be considered by the judge when imposing a sentence for non-capital felonies. It also enacted new statutory sections giving victims notice of various hearings. Noticeably absent from Senate Bill No. 172 as enacted, however, is any statutory authorization for victim participation during the capital sentencing process. Senate Bill No. 172 as enacted was an experiment in Ohio law and contained a "sunset provision" effective July 1, 1987 "in order to eliminate on that date the rights of the victim or the families of victims to make a statement at any hearing or proceeding at which a charge is resolved without trial and to receive information on the future treatment of the offender and be notified of any pending pardon, commutation, or parole." Appendix B *infra* at 75.

Senate Bill No. 76 (140 v S 76) was also introduced during the 115th General Assembly to enact Revised Code Section 2937.081 requiring a prosecutor to notify the victim or the victim's agent of the date, time, and place of trial or other final disposition in a criminal case. Senate Bill No. 76 as introduced applied to all felony offenses including capital offenses and required the prosecutor to notify the victim either orally or in writing of the

date and time of the dispositional hearing. See Appendix C, *infra* at 121. However, Senate Bill No. 76 as enacted specifically exempted capital offenses from this notification requirement. See Exhibit D *infra* at 127. Senate Bill No. 76 as enacted also contained a "sunset provision" re-pealing the legislation on July 1, 1987.

The third opportunity for the Ohio General Assembly to address this issue came in 1987 when Senate Bill No. 6 (142 v S 6) was enacted. Senate Bill No. 6, as enacted, removed the sunset provisions and made permanent the provisions in Senate Bills 76 and 172. Senate Bill No. 6 also contained new "victims' rights" provisions. Revised Code Section 2943.041 was amended to give victims the right to make a statement relative to the victimization and, if applicable, the sentencing of the offender either orally or in writing. See Appendix E *infra* at 135-36. Senate Bill No. 6 also enacted Revised Code Section 2945.07:

> In any case in which a person is charged with any violation described in Division (A) [...] the court, prior to imposing sentence on the offender, shall determine whether the victim [...] or a representative member of the victim's family if the victim died as a result of that act, is present at the sentencing phase of the trial. If the court determines that the victim or a representative member of the victim's family is present [...] the court shall inform the victim or representative family member that he is entitled to make a statement relative to the victimization and the sentencing of the offender, and the court, subject to any reasonable terms and conditions it imposed, shall permit the victim or representative family member if he so desires personally to make a

> statement at the time of the sentencing relative to the victimization and the sentencing of the offender. The court, in its discretion may require that the statement be made orally or in writing. If a victim or representative member of the victim's family personally makes a state ment under authority of this division, the name of the victim or representative family member and the fact that the statement was made shall be indicated in the record of the case.

Section 2945.07(A)(2), Ohio Rev. Code, *infra* at 141.

But, capital cases are specifically excluded:

> In any case in which a person is charged with a violation of [...] Section 2903.01 of the Revised Code *in which the indictment or count in the indictment does not contain one or more specifications of aggravating circumstances listed in Division (A) of Section 2929.04 of the Revised Code* [...] the Court [...] shall inform the victim or representative family member that he is entitled to make a statement relative to the victimization and, if applicable, the sentencing of the offender [...]."

Section 2945.07(A) (1) (emphasis added), *infra* at 140.

The General Assembly considered, but rejected giving the survivors of victims of capital homicides the right to speak at the sentencing phase of the offender's trial.

In each case the sponsor of the bill sought to make its provisions applicable to the sentencing phase of capital trials. However, the informed

decision of the Ohio General Assembly was to exclude victim impact statements and statements by survivors of homicide victims from the sentencing phase of capital trials. This has been the traditional rule in Ohio as it is in many other states with a death penalty.[1]

1

Eighteen (18) states in addition to Ohio prohibit the introduction of victim impact evidence at the sentencing hearing in a capital case: Ala. Code Section 13A-5-5 (1977); Ariz. Rev. Stat. Ann. Section 13-702 (G) (1987); Ark. Rev. Stat. Section 5-4-102 (1987); Colo. Rev. Stat. Section 16-11-102 (1988); Conn. Gen. Stat. Section 54-91(a) (1985); Fla. Stat. Section 921.143 (1984), see also, *Grossman v. State*, 525 So.2d 833, 842 (Fla. 1988); Ga. Code Section 27-2502.1(a) (1985); Idaho, see *State v. Charboneau*, 774 P.2d 299, 320 (1989); Ill. Ann. Stat. Chapt. 38 Section 1005-4-1 (1986); Ind. Code Section 35-38-1-8.5 (1990), see also, *Hough v. State*, 560 N.E.2d 511, 515 (Ind. 1990), citing to *State v. Post, infra*; Ky. Rev. Stat. Section 532.050(1) (1990); La. Code Crim. Proc. 905 (West 1989); New Mexico, see *State v. Clark*, 772 P.2d 322, 332-33 (N.M. 1989); Okla. Stat. Ann. tit. 22 Section 982 (West 1982); 42 Pa. Cons. Stat. Section 9731 (1980); S.C. Code Ann. Section 16-3-1550 (Law. Co-op. 1989); Tenn. Code Ann. Section 40-35-203 (1990); Va. Code Section 19.2-299.1 (1989).

Twelve (12) states allow discretionary admission: California, see *People v. Ghent*, 43 Cal. 3d 739, 772 (1987) and *People v. Miranda*, 43 Cal. 3d 57, 113 (1987); Miss. Code Ann. Section 99-19-157 (1987), but see, *Shell v. State*, 554 So.2d 887 (Miss. 1989) (inadmissible under certain circumstances); Mo. Rev. Stat. Section 557.026 (1986); Mont. Code Ann. Section 46-18-111 (1989); Neb. Rev. Stat. 29-2260 (1989); Nev. Rev. Stat. Section 176.145 (1989); N.C. Gen. Stat. Section 15A-825 (1989); Ore. Rev. Stat. Section 137.530 (1983); S.D. Comp. Laws Ann. Section 23A-27-1.1 (1988); Tx. Code Crim. Proc. Ann. art. 37.071 (Vernon 1985), but see, *James v. State*, 772 S.W.2d 84, 100-01 (Tx. Cr. App. 1989) (admission of evidence objectionable, but objection may be waived); Wash. Rev. Code Ann. Section 7.69.020 (1990); Wyo. Stat. Section 7-21-103 (1990).

Five (5) states mandate consideration although it is (Footnote Continued)

B. OHIO CASELAW PRIOR TO VICTIMS' RIGHTS LEGISLATION

The Ohio General Assembly first enacted a "victims' rights" law in 1980. See Section 2947.051, Ohio Revised Code. But the Ohio Supreme Court had addressed this issue more than a decade before. See *State v. White*, 15 Ohio St. 2d 146, 239 N.E.2d 65 (1968). Wrote the Court:

> The use by the state of evidence of the victim's background, and reliance upon such evidence in its argument for the death penalty is improper and constitutes error, but while such error may be cause for reversal because of its prejudicial effect on a jury, it must affirmatively appear that in a bench trial the court relied on such testimony in arriving at its verdict in order for such error to be ground for reversal.

Id., syllabus 2, 15 Ohio St. 2d, at 146, 239 N.E.2d, at 67.

This rule and its rationale are based on state evidence law:

> Such evidence is excluded because it is irrelevant and immaterial to the guilt or innocence of the accused and the penalty to be imposed. The principal reason for its prejudicial effect is that it serves

(Footnote Continued)
unclear whether this evidence must be presented to the jury: Del. Code Ann. tit. 11 Section 4331 (1988); Md. Ann. Code art. 41 Section 4-609(d); N.H. Rev. Stat. Ann. Section 651:4-a (1983); N.J. Rev. Stat. Section 2C:44-6 (1990); Utah Code Ann. Section 64-13-20 (1990).

> to inflame the passion of the jury with evidence collateral to the principal issue at bar.

Id., 15 Ohio St. 2d, at 151, 239 N.E.2d at, 70.

The Ohio General Assembly could well have concluded in 1980 that *White* was improperly decided and that such evidence should be made admissible. *White* makes no mention of constitutional principles, and is based on state rules of evidence. The clear indication in *White* is that had the case been tried to a jury the death sentence would have been reversed:

> Although the admission and subsequent argument with use of this testimony may very well have constituted prejudicial error before a jury, we do not believe that defendant was prejudiced before a three judge court [...].
>
> ***
>
> We indulge in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary. *People v. Smith*, 55 Ill. App. 2d 480, 204 N.E.2d 577.

15 Ohio St. 2d, at 151, 239 N.E.2d, at __.

State v. White is controlling precedent under Ohio law, and its continued validity is beyond question. See, *In re Baker*, 18 Ohio App. 2d 276, 283, 47 Ohio Op. 2d 411, 415 (1969); *State v. Wallen*, 21 Ohio App. 2d 27, 35-36, 50 Ohio Op. 2d 50, 55 (1969); *State v. Austin*, 52 Ohio App. 2d 59, 70, 368 N.E.2d 59,_(1976); *State v. Eubank*, 60 Ohio St. 2d 183, 187, 398 N.E.2d 567,__(1979).

C. OHIO LAW AFTER VICTIMS' RIGHTS LEGISLATION

The Ohio Supreme Court has had three opportunities to consider victim impact evidence since enactment of the first "victims' rights" law in 1980, and the reenactment in 1981 of Ohio's death penalty. In *State v. Post*, 32 Ohio St. 3d 380, 513 N.E.2d 754 (1987), *cert. denied*, 484 U.S. 1079 (1988) the defendant requested a pre-sentence investigation. The report included a victim-impact statement which "summarised the effect of the victim's murder on her family, the impact of her loss on their daily lives, as well as the family's belief that the defendant should receive the death penalty." *Post*, *supra*, 32 Ohio St. 3d, at 383, 513 N.E.2d, at 758. In addition, one of the victim's sons was permitted to address the three-judge panel during the mitigation hearing. Ronald Post, made two claims relating to this issue in his appeal to the Ohio Supreme Court. "(1) The Ohio Revised code does not authorize the introduction of victim impact evidence in a capital case, and (2) such evidence is inflammatory and prejudicial and therefore denies a fair sentencing determination as guaranteed by the Eighth and Fourteenth Amendments." 32 Ohio St. 3d, at 383, 513 N.E. 2d, at 757.

The Ohio Supreme Court distinguished the state issue from the federal constitutional issue: "Before applying the principles enunciated in *Booth*, *supra*, to the facts at bar, we will examine the admissibility of victim impact evidence in capital sentencing hearings under Ohio law." 32 Ohio St. 3d, at 383, 573 N.E.2d, at 758.

The Ohio Supreme Court then proceeded to evaluate the clear language of the relevant statutes, as noted above, and ruled that no authority existed under Ohio law to admit victim-impact evidence in capital cases. The Court concluded that, "[b]ased on

the foregoing, we find error in the admission of the victim impact evidence." 32 Ohio St. 3d, at 383-384, 513 N.E. 2d at 759.

Only after examining the admissibility and concluding that admission of such evidence was unauthorized and erroneous did the Ohio Supreme Court proceed to consider constitutional issues. *Booth* was distinguished and the sentence affirmed on the basis of the precedent established in *State v. White*, *supra:* "the risks of arbitrary and prejudicial sentencing which guided the court in *Booth* are not present in the case *sub judice* because this case was before a three-judge panel." 32 Ohio St. 3d, at 384, 513 N.E.2d, at 759.

In subsequent cases the Ohio Supreme Court continued to find error in admission of victim-impact statements under state law but, as each case involved a three-judge panel and no showing that the panel was influenced by the evidence, the Ohio Court declined to reverse. In *State v. Sowell*, 39 Ohio St. 3d 322, 327, 530 N.E.2d 1294, 1302 (1989), *cert. denied*, 490 U.S. ___, 109 S.Ct. 1766, 104 L. Ed 2d 999, *reh'g denied*, 104 L. Ed. 2d 999 (1989) the Court described its *Post* opinion as one where the Court, "analyzed the *Booth* decision and examined the admissibility of victim impact evidence in capital sentencing hearings under Ohio law, [...] concluded that it was error to admit such evidence, but that the error did not warrant reversal in that case [...]". In *State v. Cooey*, 46 Ohio St. 3d 20, 544 N.E.2d 895 (1989), the Court was presented with several arguments. To one, based on *Booth*, the Court responded that the victim-impact statements had not been considered by the panel in arriving at the death verdict, but only properly, "in justification of the lengthy consecutive sentences imposed for the non-capital felonies." Ohio statutes require the sentencing court to consider victim impact evidence at sentencing on non-capital charges. *Id.*, 46 Ohio St. 3d, at 34,544 N.E.2d, at 913. The *Cooey* Court also

had the opportunity to consider whether a pre-sentence investigative report prepared pursuant to Rev. Code Section 2929.03 (D) (1) was properly prepared when it contained the opinion of a police officer that Cooey ought to be executed: "This opinion was irrelevant. However, it does not appear that the trial court placed any reliance on the captain's recommendation [that Cooey be executed]. We find this error harmless beyond a reasonable doubt." 46 Ohio St. 3d, at 35, 544 N.E. 2d, at 913-914.

In a case decided just four months before *State v. Huertas, supra* , the Ohio Supreme Court considered both the federal and state questions. In *State v. Brewer*, 48 Ohio St. 3d 50, 54, 549 N.E.2d 491, 496, (1990), *cert. denied*, _U.S._, 111 S. Ct. 218, 112 L. Ed. 2d 177 (1990), the pre-sentence report contained letters from several people all of which were excluded as hearsay by agreement of counsel, with the exception of a letter from the husband of the victim which was admitted, "in lieu of his making a verbal statement." The report's conclusion was also stricken by agreement of counsel. *Id.*, 48 Ohio St. 3d, at 54, 549 N.E. 2d, at 496. Defense counsel argued that admission of the husband's letter violated *Booth*. However, the Ohio Supreme Court concluded that *Booth* did not apply to bench trials. *State v. Brewer*, 48 Ohio St. 3d, at 55, 549 N.E. 2d, at 497. *Brewer* also contended that he was prejudiced by the introduction of the letter before the panel even under the test enunciated in *Post*. The Court considered this seperate, non-constitutional claim but still refused to reverse. There was no mention of the victim impact evidence in the panel's opinion nor any indication the panel relied on it in arriving at the sentence of death. *Id.*

The Ohio Supreme Court has found the admission of victim impact evidence to be error in every case where it has been admitted at a capital sentencing proceeding. The remedy for the error has varied

depending on the likely impact of the evidence upon the fact-finder.[2] Admission of this evidence before a jury normally calls for reversal under Ohio law.

D. THE EXISTENCE OF AN ADEQUATE AND INDEPENDENT STATE GROUND FOR THE DECISION MEANS THAT THERE IS NO STRICT NECESSITY TO ADDRESS THE CONSTITUTIONAL ISSUE.

1.

This Court has cogently stated that its:

> only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

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See e.g., *State v. Buell*, 38 Ohio St. 3d 29, 40, 526 N.E. 2d 274, 286 (1988), *cert. denied*, _U.S._, 109 S. Ct. 1256, 103 L.Ed. 2d 823 (1989) *reh'g denied*, _U.S._, 109 S. Ct. 3268, 106 L.Ed. 2d, 612 (1990). The prosecutor's victim impact comments during closing argument in penalty phase did not require reversal as they did not inflame the jury and influence a harsher sentence recommendation. However, the Court discussed the "forceful reasons against such argument." 38 Ohio St. 3d, at 34, 526 N.E. 2d, at 281. Justice Wright dissented, characterized the prosecutor's comments as misconduct, and would have found prejudicial and reversible error. 38 Ohio St. 3d, at 46, 526 N.E. 2d, at 292.

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977).

The case at bar is an inappropriate vehicle to reevaluate well established precedent for this very reason. This Court's action will have no bearing on the outcome of the case and will function only as an advisory opinion. If this Court is to reexamine *Booth* and *Gathers* at all it should do so only when presented with a real case and controversy. In the case *sub judice*, two concurring justices and one dissenting justice in the Court below invited review by this Court. Their opinions, however, are *dicta*. The syllabus[3] of the case states an independent state ground for the decision, albeit not clearly, and this Court has previously noted that under Ohio law, the syllabus is the law of the case. *Ohio v. Johnson*, 467 U.S. 493, 499, n.7 (1984).

Nor is this case ripe for decision on constitution grounds. This Court has often held that it will not, "anticipate a question of constitutional law in advance of the necessity of deciding it." *Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm.*, 113 U.S. 33, 39 (1885). See also, *Abrams v. Van Shaick*, 293 U.S. 188 (1934); *Wilshire Oil Co. v. United States*, 295 U.S. 100 (1935). Even in cases where a constitutional issue is properly presented by the record, this Court will decline to address it if there is also present some other ground upon which

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The Constitutional Right referred to in the syllabus is a state constitutional right to be sentenced by a jury. This right is secured to Ohio citizens under Article I Section 10 of the Ohio Constitution. This Court has previously rejected the existence of a federal constitution of right to jury sentencing in *Spaziano v. Florida*, 468 U.S. 447 (1984) and the Ohio Supreme Court was aware of this fact. *State v. Rogers* (II), 28 Ohio St. 3d 427, 504 N.E.2d 52 (1986).

the case may be decided. *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 191 (1909). The plain and simple rule is that, "[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295 (1905).

The prosecution has been brought to task for a violation of the state rules of evidence so serious as to prejudice the defendant before the sentencing jury. No federal constitutional interpretation by this Court compelled the decision of the Ohio Supreme Court. The evidence improperly admitted in this case would warrant reversal of a death sentence under Ohio law even had *Booth* and *Gathers* never been decided. The Ohio Supreme Court recognized this in the syllabus and the majority holding. The *dicta* which gives rise to the case in this Court is little more than a request by a minority on the Court below who think *Booth* and *Gathers* should be reconsidered. But reconsideration of those cases must be left for another day. Close analysis of this case reveals that it does not tender the underlying constitutional issues, "in clean cut and concrete form." *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 568 (1947) (Rutledge, J.). Justice Rutledge's words in *Rescue Army, supra*, could have been written for this case:

> From *Hayburn's Case*, 2 Dall. 469, 1 L. Ed. 436 [forward] [...] this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications [...] arose in the Court's refusal to render advisory opinions and in applications of related jurisdictional policy drawn from the case and controversy limitation. U.S. Const. Art. III. The same policy has been reflected continuously not only in decisions but also in rules of court and in statutes

made applicable in jurisdictional matters, including the necessity for reasonable clarity and definiteness, as well as for timeliness, in raising and presenting constitutional questions.

•••

The policy, however, has not been limited to jurisdictional determinations. For in addition, 'the Court has developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.'

•••

> Some, if not indeed all, of these rules have found 'most varied applications.' And every application has been an instance of reluctance, indeed of refusal, to undertake the most important and the most delicate of the Court's functions, notwithstanding conceded jurisdictions, until necessity compels it in the performance of constitutional duty. [Citations omitted].

331 U.S., at 568-69

In *Michigan v. Long*, 463 U.S. 1032 (1983) this Court developed a rule to resolve the "vexing issue" surrounding its jurisdiction to review state court judgments which may rest upon adequate and independent grounds. The new rule presumes jurisdiction if, "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy of the state

ground is not clear from the fact of the opinion. *Id.*, 463 U.S., at 1040-41. *Michigan v. Long* would appear to require the dismissal of the case on jurisdictional grounds when, after briefing and argument, it becomes apparent that the case does in fact rest upon adequate state grounds wholly independent of the constitutional issue. *Michigan v. Long* by its own terms creates no more than a "presumption of jurisdiction" which must be rebuttable: "[o]ur requirement of a 'plain statement' that a decision rests upon adequate and independent state grounds does not in any way authorize the rendering of advisory opinions." *Id.*, 463 U.S. at 1042.

Comparison of the instant case to *Michigan v. Long* is instructive. First, in *Long* the state court's reference to the state constitutional basis for the decision was oblique. In this case the syllabus clearly refers to a state constitutional right to jury sentencing. See note 3, *supra*. As this Court has previously held, "[The *Long*] presumption must be applied in light of the syllabus rule of the Ohio Supreme Court [...]". *Ohio v. Johnson*, 467 U.S. 493, 499 n. 7 (1984), *reh'g denied*, 468 U.S. 1224 (1984). The syllabus of a decision of the Ohio Supreme Court states the law of the case. *Cassidy v. Glossip*, 12 Ohio St. 2d 17, syl. 6, 41 Ohio Op. 2d 153, 231 N.E.2d 64; *Ohio v. Gallagher*, 425 U.S. 257, 259 (1976). "Individual opinions speak the conclusions of their writer. What useful purpose they serve is an open question." *Beck v. Ohio*, 379 U.S. 89, 93 n.2 (1964). Conclusions in the body of the opinion which are not carried into the syllabus are not the law of the case. *Cassidy, supra*, 12 Ohio St. 2d, at 24, 231 N.E.2d, at 68.

Second, *Michigan v. Long* involved but a single reference to a state constitutional right. Long argued that this constituted an adequate and independent state ground, but that argument did not bear up under close scrutiny. 463 U.S. at, 1044 n. 10. In the case at bar this Court is presented with seven

(7) years of legislative history, and more than two (2) decades of case law construing Ohio evidence law regarding the admissibility of victim impact evidence and survivor's testimony at the sentencing hearings in capital cases. In *Long* this Court noted that, "the references to the state constitution in no way indicate that the decision below rested on grounds in any way *independent* from the state court's interpretation of federal law." 463 U.S., at (emphasis in original). In the case at bar there is no indication in the syllabus that the decision is dependent on federal law, the legislative history of the applicable statutes occurred before *Booth* and *Gathers* were decided, and *State v. White* which informs and controls all the subsequent caselaw on this point simply has no federal constitutional implication. This is not a case where the state court, "felt compelled by what it understood to be federal constitutional considerations to construe [...] its own law in the manner it did." *Michigan v. Long*, 463 U.S. at _, citing *Zachinni v. Scripps-Howard Broadcasting Co.*, *supra*.

Indeed, petitioner can not seriously dispute the adequacy of the state ground for the decision below. Victim impact evidence is inadmissible under state law, and petitioner's silence on this point is revealing.[4] If there is any dispute, it is about the independence of this ground which is discussed in the same breath as *Booth* in the majority opinion. However, Ohio law on this question was established by *State v. White* more than twenty (20) years before *Booth*. More recent caselaw has focused on the

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Petitioner has not always been so silent. In the Brief filed by petitioner in the Court below it was conceded, "that since the ruling in *State v. Post*, victim impact statements are not to go to the jury nor be brought out at hearing [sic]." See Brief of the State of Ohio, at 8.

requirements of the statutes, but the result has remained the same.

Finally, to accept jurisdiction in this case would constitute an unprecedented extension of this Court's jurisdiction over reversals of death sentences by State Supreme Courts. This Court has previously asserted jurisdiction over a state court's reversal of a death sentence only where the state court "quite clearly rested its reversal of the death sentence solely on the Federal Constitution." *California v. Ramos*, 463 U.S. 992, 998 (1983). See also, *California v. Brown*, 479 U.S. 538, 540 (1987), and *South Carolina v . Gathers*, *supra*, 109 S. Ct., at 2210. In the three death sentence reversal cases this Court has accepted since *Michigan v. Long*, there was either no discussion of state law in the lower court opinion, or the lower court expressly declined to consider the possibility independent state law ground. See *Ramos*, at 998, n.2. In *Ramos*, *Brown* and *Gathers* this Court presumed against jurisdiction unless the state court clearly relied exclusively on federal grounds. Such an approach to jurisdiction in this unique category of cases in essential to maintain respect for the State's sovereignty in the one area where its sovereignty is at its peak: "Foremost among the perogatives of sovereignty is the power to create and enforce a criminal code." *Heath v. Alabama*, 474 U.S. 82 90 (1985). Comity requires this result.

CONCLUSION

This Court has traditionally refrained from deciding constitutional questions when an adequate and independent state ground for the decision exists. Such is the case *sub judice*. This Court should decline to address the constitutional question because there is no "strict necessity" to do so, because the part of the opinion below that presents the federal question is *dicta*, and because resolution of the federal question will have no effect on the

outcome of this litigation. This Court has declined to render advisory opinions in the past and should decline to do so in this case. The reasons for this rule are fundamental to our system of federalism and this Court's place in that system. The case at bar presents no exception to the rule.

The "presumption of jurisdiction" created by *Michigan v. Long* is rebuttable, and where it becomes apparent that an adequate and independent state ground exists for a decision, the jurisdictional question must be addressed anew. Many reasons for this result can be advanced, not the least of which are the principles of comity in our federalist system of government. The Ohio General Assembly has chosen not to allow victim impact evidence at the sentencing hearing in capital cases. This is a state's perogative. Respect for Ohio's sovereignty should inform this Court's decision on the jurisdictional question. The case at bar presents the converse of the situation presented in *California v. Ramos*, *supra* where the will of the California legislature was thwarted by the California Supreme Court's erroneous interpretation of federal law. The Ohio Supreme Court has done no more than enforce the express legislative intent of the Ohio General Assembly. Here it was petitioner who circumvented the law in the trial court and is attempting to do the same in this Court.

This court should recognize the existence of the adequate and independent state grounds for the decision below and decline to reach the constitutional issues pressed upon it by petitioner and their *amici*. No decision of this Court can change the outcome of this case, and any opinion rendered would be merely advisory.

Respectfully Submitted,

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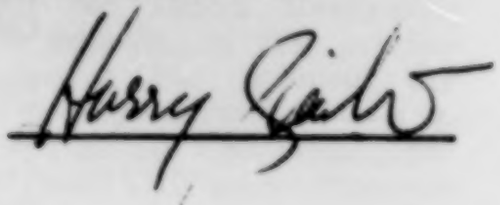
CERTIFICATE OF SERVICE

Pursuant to Rules 29.3 and 29.5(b) of this Court, I Harry R. Reinhart, a member of the bar of this Court, hereby certify that on this 17 day of December, 1990, three copies of the foregoing Motion for Leave to file Brief and Brief of the Ohio Association of Criminal Defense Lawyers and National Association of Criminal Defense Lawyers as *Amici Curiae* In Support of Respondent were mailed, first

class postage pre-paid to JoAnn Bour-Stokes, 8 East Long Street, 9th Floor, Columbus, Ohio 43266-0587, Counsel for Respondent; Jonathon E. Rosenbaum, 226 Middle Avenue, 4th Floor, Elyria, Ohio 44035, Counsel for Petitioner; Paul D. Kamenar, 1705 N Street, N.W., Washington, D.C., 20036, Counsel for *Amici* Washington Legal Foundation, et al., Harry B. Sondheim, 849 South Broadway, 11th Floor, Los Angeles, California, 90014-3570, Counsel for *Amicus* California District Attorneys Association; Jay M. Bloom, 110 West A Street, Suite 700, San Diego, California, 92101, Counsel for *Amicus* State of California; Kenneth W. Starr, Office of the Solicitor General, Department of Justice, Washington, D.C., 20530, Counsel for *Amicus* United States. I further certify that all parties required to be served have been served.



APPENDIX A

As Introduced

115th General Assembly
Regular Session S.B. No. 172
1983-1984

MR. PFEIFFER

A BILL

To amend sections 2151.35, 2151.355, 2151.38, 2929.03, 2929.11, 2929.12, 2929.14, 2947.051, 2951.02, 2951.03, 2951.04, 2951.041, 2967.12, and 2967.31 of the Revised Code to permit victims of felonious acts or their families to attend and present evidence or opinions at sentencing, dispositional, parole, and early release hearings.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 2151.35, 2151.355, 2151.38, 2929.03, 2929.11, 2929.12, 2929.14, 2947.051, 2951.02, 2951.03, 2951.04, 2951.041, 2967.12, and 2967.31 of the Revised Code be amended to read as follows:

Sec. 2151.35. The juvenile court may conduct its hearings in an informal manner and may adjourn such hearings from time to time. In the hearing of any case, the general public may be excluded and only such persons admitted as have a direct interest in the case.

All cases involving children shall be heard separately and apart from the trial of cases against adults. The court may excuse the attendance of the child at the hearing in cases involving abused, neglected, or dependent children. The court shall hear and determine all cases of children without a jury.

If the court finds from clear and convincing evidence that the child is an abused, neglected, or dependent child, or finds beyond a reasonable doubt that the child is a delinquent or unruly child or a juvenile traffic offender, the court shall proceed immediately, or at a postponed hearing, to hear the [page 2] evidence as to the proper disposition to be made under sections 2151.352 to 2151.355 of the Revised Code AND, BEFORE MAKING AN ORDER OF DISPOSITION, SHALL CONSIDER THE EVIDENCE AND OPINIONS PRESENTED BY THE VICTIM OR THE VICTIM'S FAMILY AND THE VICTIM IMPACT STATEMENT PREPARED PURSUANT TO SECTION 2947.051 OF THE REVISED CODE. If the court does not so find, it shall order that the complaint be dismissed and that the child be discharged from any detention or restriction theretofore ordered.

A record of all testimony and other oral proceedings in juvenile court shall be made in all proceedings that are held pursuant to section 2151.414 of the Revised Code or in which an order of disposition may be made pursuant to division (A)(4) of section 2151.353 of the Revised Code, and shall be made upon request in any other proceedings. The record shall be made as provided in section 2301.20 of the Revised Code.

Sec. 2151.355. (A) If a child is found by the court to be a delinquent child, the court, AFTER CONSIDERING THE EVIDENCE AND OPINIONS PRESENTED BY THE VICTIM OR THE VICTIM'S FAMILY AND THE VICTIM IMPACT STATEMENT PREPARED PURSUANT TO SECTION 2947.051 OF THE REVISED CODE, may make any of the following orders of disposition:

(1) Any order that is authorized by section 2151.353 of the Revised Code;

(2) Place the child on probation under any conditions that the court prescribes. If the child is adjudicated a delinquent child because he violated section 2909.05, 2909.06, or 2909.07 of the Revised Code and if restitution is appropriate under the

circumstances of the case, the court shall require the child to make restitution for the property damage caused by his violation as a condition of the child's probation. If the child is adjudicated a delinquent child because he violated any other section of the Revised Code, the court may require the child as a condition of his probation to make restitution for the property damage caused by his violation and for the value of the property that was the subject of the violation he committed, if it would [page 3] be a theft offense, as defined in division (K) of section 2913.01 of the Revised Code, if committed by an adult. The restitution may be in the form of a cash reimbursement paid in a lump sum or in installments, the performance of repair work to restore any damaged property to its original condition, the performance of a reasonable amount of labor for the victim approximately equal to the value of the property damage caused by his violation or to the value of the property that is the subject of the violation if it would be a theft offense if committed by an adult, the performance of community service or community work, any other form of restitution devised by the court, or any combination of the previously described forms of restitution.

(3) Commit the child to the temporary custody of any school, camp, institution, or other facility for delinquent children operated for the care of delinquent children by the county, by a district organized under section 2151.34 or 2151.65 of the Revised Code, or by a private agency or organization, within or without the state, that is authorized and qualified to provide the care, treatment, or placement required;

(4) If the child was adjudicated delinquent by reason of having committed an act that would be a felony of the third or fourth degree if committed by an adult, commit the child to the legal custody of the department of youth services for institutionalization for an indefinite term consisting of a minimum period of six months and a

maximum period not to exceed the child's attainment of the age of twenty-one years;

(5) If the child was adjudicated delinquent by reason of having committed an act that would be a felony of the first or second degree if committed by an adult, commit the child to the legal custody of the department of youth services for institutionalization in a secure facility for an indefinite term consisting of a minimum period of one year and a maximum period not to exceed the child's attainment of the age of twenty-one years; [page 4]

(6) If the child was adjudicated delinquent by reason of having committed an act that would be the offense of murder or aggravated murder if committed by an adult, commit the child to the legal custody of the departm.. of youth services for institutionalization in a secure facility until the child's attainment of the age of twenty-one years;

(7) Impose a fine not to exceed fifty dollars and costs;

(8) Require the child to make restitution for all or part of the property damage caused by his delinquent act and for all or part of the value of the property that was the subject of any delinquent act that he committed and that would be a theft offense, as defined in division (K) of section 2913.01 of the Revised Code, if committed by an adult. If the court determines that the victim of the child's delinquent act was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the act, the court shall, regardless of whether or not the child knew the age of the victim, consider this fact in favor of imposing restitution, but that fact shall not control the decision of the court. The restitution may be in the form of a cash reimbursement paid in a lump sum or in installments, the performance of repair work to restore any damaged property to its original condition, the performance of a reasonable amount of labor for the victim, the performance of community service or community work, any other form of

restitution devised by the court, or any combination of the previously described forms of restitution.

(9) Suspend or revoke the operator's license issued to the child, or suspend or revoke the registration of all motor vehicles registered in the name of the child;

(10) Make any further disposition that the court finds proper.

(B) At the dispositional hearing and prior to making any disposition pursuant to division (A) of this section, the court shall determine whether the victim of the delinquent act committed by the child was sixty-five years of age or older or [page 5] permanently and totally disabled at the time the delinquent act was committed and whether the delinquent act would have been an offense in violence if committed by an adult. If the victim was sixty-five years of age or older or permanently and totally disabled at the time the act was committed, regardless of whether or not the child knew the age of the victim, and if the act would have been an offense of violence if committed by an adult, the court shall consider these facts in favor of imposing commitment under division (A)(3), (4), (5), or (6) of this section, but these facts shall not control the court's decision.

(C)(1) When a juvenile court commits a delinquent child to the custody of the department of youth services pursuant to this section, the court shall not designate the specific institution in which the child is to be placed by the department, but instead shall specify that the child is to be institutionalized or that the institutionalization is to be in a secure facility if that is required by division (A) of this section.

(2) When a juvenile court commits a delinquent child to the custody of the department of youth services, the court shall provide the department with the child's social history, medical records, section or sections of the Revised Code violated and the degree of the violation, and any other records of the child that the department

reasonably requests. The court at that time also shall give notice to the school attended by the child of the child's commitment by sending to that school a copy of the court's journal entry ordering the commitment. As soon as possible after receipt of the notice described in this section, the school shall provide the department of youth services with the child's school transcript. However, the department shall not refuse to accept a child committed to it, nor shall a child committed to it be held in a county or district detention home because of the court's failure to provide the records it is required to provide under this division or because of a school's failure to provide the records it is required to provide under this division. The department of youth services shall provide [page 6] the court and the school with an updated copy of the child's school transcript and shall provide the court with a summary of the institutional record of the child when it releases the child from institutional care. The department also shall provide the court with a copy of any portion of the child's institutional record that the court specifically requests within five working days of the request.

(D)(1) At any hearing at which a child is adjudicated delinquent, or as soon as possible after the hearing, the court shall notify all victims of the delinquent act, who may be entitled to a recovery under any of the following sections, of the right of the victims to recover, pursuant to section 3109.09 of the Revised Code, compensatory damages from the child's parents; of the right of the victims to recover, pursuant to section 3109.10 of the Revised Code, compensatory damagesfrom the child's parents for willful and malicious assaults committed by the child; and of the right of the victims to recover an award of reparations pursuant to section 2743.51 to 2743.72 of the Revised Code.

(2) AT ANY HEARING AT WHICH A CHILD IS ADJUDICATED DELINQUENT FOR THE COMMISSION OF AN ACT THAT WOULD BE A FELONY IF COMMITTED BY AN ADULT,

OR AS SOON AS POSSIBLE AFTER THE HEARING, THE COURT SHALL GIVE THE VICTIM OF THE DELINQUENT ACT, OR THE VICTIM'S FAMILY IF THE VICTIM DIED AS A RESULT OF THE DELINQUENT ACT, WRITTEN NOTICE OF HIS OR THEIR RIGHT TO APPEAR PERSONALLY OR THROUGH COUNSEL AT ANY HEARING TO DETERMINE THE DELINQUENT CHILD'S ORDER OF DISPOSITION. THE VICTIM OF ANY DELINQUENT ACT THAT WOULD BE A FELONY IF COMMITTED BY AN ADULT, OR THE VICTIM'S FAMILY IF THE VICTIM DIED AS A RESULT OF THE DELINQUENT ACT, MAY APPEAR PERSONALLY OR THROUGH HIS OR THEIR ATTORNEY AT ANY HEARING TO DETERMINE THE ORDER OF DISPOSITION FOR ANY CHILD WHO IS ADJUDICATED A DELINQUENT CHILD FOR THE COMMISSION OF THE DELINQUENT ACT COMMITTED AGAINST THE VICTIM. AT THE HEARING, THE VICTIM, THE VICTIM'S FAMILY, OR THE ATTORNEY OF THE VICTIM OR THE [page 7] VICTIM'S FAMILY MAY PRESENT EVIDENCE AND OPINIONS THAT ARE RELEVANT TO THE DISPOSITION OF THE DELINQUENT CHILD.

Sec. 2151.38. (A) When a child is committed to the legal custody of the department of youth services or, COMMITTED to the permanent custody of a county department of welfare that has assumed the administration of child welfare, a county children services board, or a certified organization, or committed pursuant to division (A)(4) of section 2151.353 or section 2151.414 of the Revised Code, the jurisdiction of the juvenile court in respect to the child so committed shall cease and terminate at the time of the commitment, except as provided in divisions (B) and (C) of this section and except that if the department of youth services or any county department, board, or certified organization having permanent custody makes a motion to the court for the termination of permanent custody, the court upon

the motion, after notice and hearing and for good cause shown, may terminate permanent custody at any time prior to the child's attainment of the age of twenty-one years. The court shall make disposition of the matter in whatever manner will serve the best interests of the child. All other commitments made by the court shall be temporary and shall continue for a period that is designated by the court in its order, until terminated or modified by the court, or until a child attains the age of twenty-one years.

(B)(1) Notwithstanding any contrary provision in Chapter 5139. of the Revised Code, if a child is committed to the department of youth services pursuant to division (A)(4) or (5) of section 2151.355 o the Revised Code, the department shall not release the child from institutional care or institutional care in a secure facility, whichever is applicable, and as a result shall not discharge the child, order his release on parole, or assign him to a family home, group care facility, or other place for treatment or rehabilitation,prior to the expiration of the prescribed minimum periods of institutionalization unless the department, the child, or the child's parent requests an early [page 8] release from institutional care or institutional care in a secure facility, whichever is applicable, from the court that committed the child and the court approves the early release in a journal entry, or unless the court on its own motion grants an early release.

Notwithstanding any contrary provision in Chapter 5139. of the Revised Code, if a child is committed to the department of youth services pursuant to division (A)(6) of section 2151.355 of the Revised Code, the department shall not release the child from institutional care in a secure facility, and as a result shall not discharge the child, order his release on parole, or assign him to a family home, group care facility or other place for treatment or rehabilitation, prior to the child's attainment of the age of twenty-one years unless the department, the child, or the child's parent requests

an early release from institutional care in a secure facility from the court that committed the child and the court approves the early release in a journal entry, or unless the court on its own motion grants an early release.

(2) If the department of youth services desires to release a child committed to it pursuant to division (A)(4) or (5) of section 2151.355 of the Revised Code from institutional care or institutional care in a secure facility, whichever is applicable, prior to the expiration of the prescribed minimum periods of institutionalization or if it desires to release a child committed to it pursuant to division (A)(6) of that section from institutional care in a secure facility prior to the child's attainment of the age of twenty-one years, it shall request the court that committed the child for an early release from institutional care or institutional care in a secure facility, whichever is applicable. Upon receipt of the request by the department, or a request for such an early release from the child or the child's parent, or upon its own motion AND AFTER CONSIDERING THE VICTIM IMPACT STATEMENT PREPARED PURSUANT TO SECTION 2947.051 OF THE REVISED CODE, the court shall either approve the early release from institutional care or [page 9] institutional care in a secure facility, whichever is applicable, by journal entry or schedule a time within thirty days for a hearing on whether the child is to be released. If the court schedules a hearing, it shall order the department of youth services to deliver the child to the court on the date set for the hearing and present to the court at that time a treatment plan for the child's post-institutional care. THE VICTIM OF THE CHILD'S DELINQUENT ACT OR THE VICTIM'S FAMILY, IF THE VICTIM DIED AS A RESULT OF THE ACT, MAY ATTEND THE HEARING PERSONALLY OR THROUGH AN ATTORNEY TO PRESENT EVIDENCE AND OPINIONS ON THE CHILD'S EARLY RELEASE. The court shall determine at the hearing whether the

child should be released from institutionalization or institutionalization in a secure facility, whichever is applicable. If the court approves the early release, the department of youth services shall prepare a written treatment and rehabilitation plan for the child pursuant to division (D) of this section, which shall include the terms and conditions of his release. It shall send the committing court and the juvenile court of the county in which the child is placed a copy of the plan and the terms and conditions that it fixed. The court of the county in which the child is placed may adopt the terms and conditions set by the department as an order of the court and may add any additional consistent terms and conditions it considers appropriate. If a child is released under this division and the court of the county in which the child is placed has reason to believe that the child has not deported himself in accordance with any post-release terms and conditions established by the court in its journal entry, the court of the county in which the child is placed shall schedule a time for a hearing on whether the child violated any of the post-release terms and conditions. If the court of the county in which the child is placed determines at the hearing that the child violated any of the post-release terms and conditions established by the court in its journal entry, the court may, if it determines that the violation of the terms and conditions was a serious violation, order the [page 10] child to be returned to the department of youth services for institutionaliz ation or institutionalization in a secure facility, consistent with the original order of commitment of the child, or in any case, may make any other disposition of the child authorized by law that the court considers proper. If the court of the county in which the child is placed orders the child to be returned to a department of youth services institution, the time during which the child was institutionalised or institutionalized in a secure facility, whichever is applicable, prior to his early release shall be considered as time served

in fulfilling the prescribed minimum period of institutionalization or institutionalization in a secure facility that is applicable to the child under his original order of commitment. If the court orders the child return to a department of youth services institution, the child shall remain in institutional care for a minimum period of three months.

(C) If a child is committed to the department of youth services pursuant to division (A)(4) or (5) of section 2151.355 of the Revised Code and the child has been institutionalized or institutionaliz ed in a secure facility, whichever is applicable, for the prescribed minimum periods of time under those divisions, the department, without approval of the court that committed the child, may release the child from institutional care or discharge the child. If the department releases the child from institutional care and then orders his release on parole or assigns him to a family home, group care facility, or other place for treatment or rehabilitation,the department also shall prepare a written treatment and rehabilitation plan for the child pursuant to division (D) of this section, which shall include the terms and conditions of his release or assignment, and shall send the committing court and the juvenile court of the county in which the child is placed a copy of the plan and the terms and conditions that it fixed. The court of the county in which the child is placed may adopt the terms and conditions as an order of the court, and may add any additional consistent terms and [page 11] conditions it considers appropriate. The release, discharge, release on parole, or assignment shall be in accordance with division (C) of section 5139.06 of the Revised Code. Upon notification of a pending release, discharge, release on parole, or assignment in accordance with that division, the committing court shall enter the notification in its journal. If a child is released on parole or is assigned subject to specified terms and conditions and the court of the county in which the child is placed has reason to believe that the child

has not deported himself in accordance with any post-release terms and conditions established by the court in its journal entry, the court of the county in which the child is placed may, in its discretion, schedule a time for a hearing on whether the child violated any of the post-release terms and conditions. If the court of the county in which the child is placed conducts a hearing and determines at the hearing that the child violated any of the post-release terms and conditions established in its journal entry, the court may, if it determines that the violation of the terms and conditions was a serious violation, order the child to be returned to the department of youth services for institutionalization or in any case, may make any other disposition of the child authorized by law that the court considers proper. If the court of the county in which the child is placed orders the child to be returned to a department of youth services institution, the child shall remain institutionalized for a minimum period of three months.

(D) The department of youth services shall, prior to the release of a child pursuant to division (B) or (C) of this section:

(1) After reviewing the child's rehabilitative progress history and medical and educational records, prepare a written treatment and rehabilitation plan for the child, which shall include terms and conditions of the release;

(2) Completely discuss the terms and conditions of the plan prepared pursuant to division (D)(1) of this section and the [page 12] possible penalties for violation of the plan with the child and his parents, guardian, or legal custodian;

(3) Have the plan prepared pursuant to division (D)(1) of this section signed by the child, his parents, legal guardian, or custodian, and any authority or person that is to supervise, control, and provide supportive assistance to the child at the time of the child's release pursuant to division (B) or (C) of this section;

(4) File a copy of the treatment plan prepared pursuant to division (B)(1) of this section, prior to the child's release, with the committing court and the juvenile court of the county in which the child is to be placed.

(E) The department of youth services shall file a written progress report with the committing court regarding each child released pursuant to division (B) or (C) of this section, at least once every thirty days unless specifically directed otherwise by the court. The report shall indicate the treatment and rehabilitative progress of the child and his family, if applicable, and shall include any suggestions and recommendations for alteration of the program, custody, living arrangements, or treatment. The department shall retain legal custody of a child so released until it discharges the child or until the custody is terminated as otherwise provided by law.

Sec. 2929.03. (A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state [page 13] whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall

include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specification of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications,and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:[page 14]

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by a jury;

(b) By the trial jury and the trial judge, if the offender was tried by a jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may

be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, SHALL CONSIDER THE VICTIM IMPACT STATEMENT PREPARED PURSUANT TO SECTION 2947.051 OF THE REVISED CODE, shall hear testimony and other evidence that is relevant to the nature and circumstances of the [page 15]

aggravating circumstances the offender was found guilty of committing, SHALL HEAR ANY EVIDENCE RELEVANT TO SENTENCING THAT IS PRESENTED BY THE VICTIM'S FAMILY, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the

sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, THE VICTIM IMPACT STATEMENT, THE EVIDENCE PRESENTED BY THE VICTIM'S FAMILY, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be [page 16] imposed on the offender. Absent such a finding, the jury shall recommend that the offender

be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of the section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, THE VICTIM IMPACT STATEMENT, THE EVIDENCE PRESENTED BY THE VICTIM'S FAMILY, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, BY PROOF BEYOND A REASONABLE DOUBT, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an [page 17] aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall, AFTER CONSIDERING THE VICTIM IMPACT STATEMENT PREPARED PURSUANT TO SECTION 2947.051 OF THE REVISED CODE AND THE EVIDENCE RELEVANT TO SENTENCING PRESENTED BY THE VICTIM'S FAMILY, the imposed one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The Court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it

could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgement in a case in which [page 18] a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

Section 2929.11. (A) Whoever is convicted of or pleads guilty to a felony other than aggravated murder or murder, except as provided in division (D) of this section, shall be imprisoned for an indefinite term and, in addition, may be fined or required to make restitution. The indefinite term of imprisonment shall consist of a maximum term as provided in this section and a minimum term fixed by the court as provided in this section. The fine and restitution shall be fixed by the court as provided in this section.

(B) Except as provided in division (D) of this section, section- 2929.71 of the Revised Code, and Chapter 2925. of the Revised Code, terms of imprisonment for felony shall be imposed as follows:

(1) For an aggravated felony of the first degree:

(a) If the offender has not previously been convicted or pled guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the

United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be five, six, seven, eight, nine, or ten years, and the maximum term shall be twenty-five years;

(b) If the offender has previously been convicted of or pled guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to [page 19] any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of ten, eleven, twelve, thirteen, fourteen, or fifteen years, and the maximum term shall be twenty-five years;

(2) For a felony of the first degree, the minimum term shall be four, five, six, or seven years, and the maximum term shall be twenty-five years;

(3) For an aggravated felony of the second degree:

(a) If the offender has not previously been convicted of or pled guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be three, four, five, six, seven, or eight years, and the maximum term shall be fifteen years;

(b) If the offender has previously been convicted of or pled guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or eleven, or twelve years, and the maximum term shall be fifteen years;

(4) For a felony of the second degree, the minimum term shall be two, three, four, or five years, and the maximum term shall be fifteen years;

(5) For an aggravated felony of the third degree:

(a) If the offender has not previously been convicted of or pled guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set [page 20] forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be two, three, four, or five years, and the maximum term shall be ten years;

(b) If the offender has previously been convicted of or pled guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the Unites States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of five, six, seven, or eight years, and the maximum term shall be ten years;

(6) For a felony of the third degree, the minimum term shall be two years, thirty months, three years, or four years, and the maximum term shall be ten years;

7) For a felony of the fourth degree, the minimum term shall be eighteen months, two years, thirty months, or three years, and the maximum term shall be five years.

(C) Fines for felony shall be imposed as follows:

(1) For an aggravated felony of the first degree or a felony of the first degree, not more than ten thousand dollars;

(2) For an aggravated felony of the second degree or a felony of the second degree, not more than seven thousand five hundred dollars;

(3) For an aggravated felony of the third degree or a felony of the third degree, not more than five thousand dollars;

(4) For a felony of the fourth degree, not more than two thousand five hundred dollars.

(D) Whoever is convicted of or pleads guilty to a felony of the third or fourth degree and did not, during the commission of that offense, cause physical harm to any person nor make an actual threat of physical harm to any person with a deadly weapon [page 21] and who has not, during the commission of any previous offense, caused physical harm to any person nor made an actual threat of physical harm to any person with a deadly weapon shall be imprisoned for a definite term, and, in addition, may be fined or required to make restitution. The restitution shall be fixed by the court as provided in this section. The terms of imprisonment shall be imposed as follows:

(1) For a felony of the third degree, the term shall be one, one and one-half, or two years;

(2) For a felony of the fourth degree, the term shall be six months, one year, or eighteen months.

(E) the court, AFTER CONSIDERATION OF THE VICTIM IMPACT STATEMENT PREPARED PURSUANT TO SECTION 2947.051 OF THE REVISED CODE AND THE EVIDENCE AND OPINIONS PRESENTED BY THE VICTIM OR THE VICTIM'S FAMILY, may require a person who is convicted of or pleads guilty to a felony to make restitution for all or part of the property damage that is caused by his offense and for all or part of the value of the property that is the subject of any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, that the person committed. If the court determines that the victim of the offense was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the offense, the court shall, regardless of whether or not the offender knew the age of the victim, consider this fact in favor of imposing restitution, by this fact shall not control the decision of the court.

Section 2929.12. (A) In determining the minimum term of imprisonment to be imposed for a felony for which an indefinite term of imprisonment is imposed, the court shall consider the risk that the offender will commit another crime and the need for protecting the public from the risk; the nature and circumstances of the offense; the victim impact statement prepared pursuant to section 2947.051 of the Revised Code, if a victim impact statement is required by that section; THE EVIDENCE AND OPINIONS PRESENTED BY THE VICTIM OR THE VICTIM'S FAMILY; and the history, [page 22] character, and condition of the offender and his need for correctional or rehabilitative treatment.

(B) The following do not control the court's discretion, but shall be considered in favor of imposing a longer term of imprisonment for a felony for which an indefinite term of imprisonment is imposed:

(1) The offender is a repeat or dangerous offender;

(2) Regardless of whether the offender knew the age of the victim, the victim of the offense was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the offense;

(3) The victim of the offense has suffered severe social, psychological, physical, or economic injury as a result of the offense.

(C) The following do not control the court's discretion, but shall be considered in favor of imposing a shorter minimum term of imprisonment for a felony for which an indefinite term of imprisonment is imposed:

(1) The offense neither caused nor threatened serious physical harm to persons or property, or the offender did not contemplate that it would do so;

(2) The offense was the result of circumstances unlikely to recur;

(3) The victim of the offense induced or facilitated it;

(4) There are substantial grounds tending to excuse or justify the offense, though failing to establish a defense;

(5) The offender acted under strong provocation;

(6) The offender has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial time before commission of the present offense;

(7) the offender is likely to respond quickly to correctional or rehabilitative treatment.

(D) The criteria listed in divisions (B) and (C) of this section do not limit the matters that may be considered in **[page 23]** determining the minimum term of imprisonment to be imposed for a felony for which an indefinite term of imprisonment is imposed.

Section 2929.14. (A) In determining whether to impose a fine for a felony and the amount and method of payment of a fine, the court shall consider the nature and circumstances of the offense, the victim impact statement prepared pursuant to section 2947.051 of the Revised Code, THE EVIDENCE AND OPINIONS PRESENTED BY THE VICTIM OR THE VICTIM'S FAMILY, the history, character, and condition of the offender, and the ability and resources of the offender and the nature of the burden that payment of a fine will impose on him.

(B) The court shall not impose a fine in addition to imprisonment for felony, unless a fine is specially adapted to deterrence of the offense or the correction of the offender, or the offense was committed with purpose to establish, maintain, to facilitate an activity of a criminal syndicate, as defined in section 2923.04 of the Revised Code, or the offense was committed for hire or for purpose of gain.

(C) The court shall not impose a fine or fines for felony that, in the aggregate and to the extent not suspended by the court, exceed the amount that

the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making restitution or reparation to the victim of his offense.

(D) At the time of imposing sentence, or as soon as possible after imposing sentence, for a felony, the court shall notify the victim of the offense of his right to file an application for an award of reparations pursuant to sections 2743.51 to 2743.72 of the Revised Code.

Section 2947.051. (A) In all criminal cases in which a person is convicted of, pleads guilty to and the plea is accepted to, or pleads no contest to and is found guilty of a felony AND IN ALL JUVENILE CASES IN WHICH A CHILD IS ADJUDICATED A DELINQUENT CHILD FOR THE COMMISSION OF AN ACT THAT WOULD BE A FELONY IF COMMITTED BY AN ADULT, the court shall, prior to [page 24] sentencing the offender OR MAKING AN ORDER OF DISPOSITION FOR THE DELINQUENT CHILD, order the preparation of a victim impact statement by the department of probation of the county in which the victim of the offense resides, by the court's own regular probation officer, or by a victim assistance program that is operated by the state, any county or municipal corporation, or any other governmental entity if the offender caused, attempted to cause, threatened to cause, or created the risk of physical harm to the victim of the offense. THE PERSON WHO PREPARES THE VICTIM IMPACT STATEMENT SHALL GIVE THE VICTIM OR THE VICTIM'S FAMILY, IF THE VICTIM DIED AS A RESULT OF THE OFFENSE OR DELINQUENT ACT, WRITTEN NOTICE OF HIS OR THEIR RIGHT TO APPEAR PERSONALLY OR THROUGH AN ATTORNEY AT THE OFFENDER'S SENTENCING HEARING, THE DELINQUENT CHILD'S DISPOSITIONAL HEARING, ANY

HEARING ON THE EARLY RELEASE OF THE DELINQUENT CHILD, AND AT ANY HEARING TO DETERMINE WHETHER TO PLACE THE OFFENDER ON PROBATION OR RELEASE HIM ON PAROLE. The court shall, in accordance with sections 2151.35, 2151.355, 2929.03, 2929.11, 2929.12, and 2929.14, 2951.02, 2951.03, 2951.04, and 2951.041 of the Revised Code, consider the victim impact statement in determining the sentence to be imposed upon the offender, THE ORDER OF DISPOSITION TO BE MADE FOR THE DELINQUENT CHILD, OR WHETHER TO PLACE THE OFFENDER ON PROBATION.

(B) Each victim impact statement shall identify the victim of the offense OR DELINQUENT ACT, itemize any economic loss suffered by the victim as a result of the offense OR DELINQUENT ACT, identify any physical injury suffered by the victim as a result of the offense OR DELINQUENT ACT and the seriousness and permanence of the injury, identify any change in the victim's personal welfare or familial relationships as a result of the offense OR DELINQUENT ACT and any psychological impact experienced by the victim or the victim's family as a result of the offense or OR DELINQUENT ACT, and contain any other information related to the impact of the offense OR DELINQUENT ACT upon the victim that the court requires. [page 25]

(C) A victim impact statement shall be kept confidential and is not a public record as defined in section 149.43 of the Revised Code. However, the court may furnish copies of the statement to both the defendant or his counsel ATTORNEY and the prosecuting attorney OR TO BOTH THE DELINQUENT CHILD OR HIS ATTORNEY AND THE PROSECUTING ATTORNEY. Any copies of a victim impact statement that are made available to the defendant or his counsel ATTORNEY, TO THE DELINQUENT CHILD OR HIS ATTORNEY, or to the prosecuting attorney shall be returned by the

person to whom they were made available to the court immediately following the imposition of sentence upon the defendant OR THE MAKING OF AN ORDER OF DISPOSITION FOR THE DELINQUENT CHILD.

(D) THE VICTIM OF ANY FELONY OR ANY DELINQUENT ACT THAT WOULD BE A FELONY IF COMMITTED BY AN ADULT OR THE VICTIM'S FAMILY, IF THE VICTIM DIED AS A RESULT OF THE FELONY OR DELINQUENT ACT, MAY APPEAR PERSONALLY OR THROUGH AN ATTORNEY, AT ANY HEARING AT WHICH THE PERSON WHO COMMITTED THE FELONY OR DELINQUENT ACT IS SENTENCED, RECEIVES AN ORDER OF DISPOSITION, OR IS CONSIDERED FOR PROBATION, PAROLE, OR EARLY RELEASE, TO PRESENT EVIDENCE AND OPINIONS ON THE FELONY OR DELINQUENT ACT AND ON THE SENTENCING OR DISPOSITION OF THE OFFENDER OR DELINQUENT CHILD.

Section 2951.02. (A) In determining whether to suspend sentence of imprisonment and place an offender on probation or to otherwise suspend an offender's sentence of imprisonment pursuant to division (D)(2) or (4) of section 2929.51 of the Revised Code, the court shall consider the risk that the offender will commit another offense and the need for protecting the public from the risk, THE VICTIM IMPACT STATEMENT PREPARED PURSUANT TO SECTION 2947.051 OF THE REVISED CODE, THE EVIDENCE AND OPINIONS PRESENTED BY THE VICTIM OR THE VICTIM'S FAMILY, the nature and circumstances of the offense, and the history, character, and condition of the offender.

(B) The following do not control the court's discretion, but shall be considered in favor of placing an offender on probation or in favor of

otherwise suspending an offender's [page 26] sentence of imprisonment pursuant to division (D)(2) or (4) of section 2929.51 of the Revised Code:

(1) The offense neither caused nor threatened serious harm to persons or property, or the offender did not contemplate that it would do so.

(2) The offense was the result of circumstances unlikely to recur.

(3) The victim of the offense induced or facilitated it.

(4) There are substantial grounds tending to excuse or justify the offense, though failing to establish a defense.

(5) The offender acted under strong provocation.

(6) the offender has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period before commission of the present offense.

(7) The offender is likely to respond affirmatively to probationary or other court-imposed treatment.

(8) The character and attitudes of the offender indicate that he is unlikely to commit another offense.

(9) The offender has made or will make restitution or reparation to the victim of his offense for the injury, damage, or loss sustained.

(10) Imprisonment of the offender will entail undue hardship to himself or his dependents.

(C) When an offender is placed on probation or his sentence is otherwise suspended pursuant to division (D)(2) or (4) of section 2929.51 of the Revised Code, the probation or other suspension shall be at least on condition that, during the period of probation or other suspension, he shall abide by the law and not leave the state without the permission of the court or his probation officer. In the interests of doing justice, rehabilitating the offender, and insuring his good behavior, the court may impose additional requirements on the offender, including, but not limited to, requiring the offender to make restitution for all or part of the property damage that is caused by his offense and for all or part of the value of the property [page 27] that is the subject of any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, that the person committed. Compliance with the additional requirements shall also be a condition of the offender's probation or other suspension.

(D) The following do not control the court's discretion, but shall be considered against placing an offender on probation or against otherwise suspension an offender's sentence of imprisonment pursuant to division (D)(2) or (4) of section 2929.51 of the Revised Coue:

(1) the offender has recently violated the conditions of any probation, parole, or pardon, or any suspension pursuant to division (D)(2) or (4) of section 2929.51 of the Revised Code, previously granted him.

(2) There is a substantial risk that while at liberty during the period of probation or other suspension the offender will commit another offense.

(3) the offender is in need of correctional or rehabilitative treatment that can best be provided by his commitment to a penal or reformatory institution.

(4) Regardless of whether the offender knew the age of the victim, the victim of the offense was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the offense.

(E) The criteria listed in divisions (B) and (D) of this section shall not be construed to limit the matters that may be considered in determining whether to suspend sentence of imprisonment and place an offender on probation or to otherwise suspend sentence of imprisonment pursuant to division (D)(2) or (4) of section 2929.51 of the Revised Code.

(F) An offender shall not be placed on probation or otherwise have his sentence to imprisonment suspended pursuant to division (D)(2) or (4) of section 2929.51 of the Revised Code when any of the following applies:

(1) The offense involved is aggravated murder or murder. [page 28]

(2) The offender is a repeat offender or a dangerous offender, as defined in section 2929.01 of the Revised Code.

(3) The offense was committed while the offender was armed with a firearm or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

(4) The offense involved is a violation of section 2907.02 or 2907.12 of the Revised Code.

(5) The offender is not eligible for probation or shock probation pursuant to division (C) of section 2903.06 or 2903.07 of the Revised Code or is sentenced to a term of actual incarceration.

(G) When an offender is convicted of a misdemeanor the court may offer to the offender, as a condition of probation that would be in addition to the required conditions of probation and the discretionary conditions of probation that may be imposed pursuant to division (C) of this section, that the offender be required to perform supervised community service work under the authority of health districts, park districts, counties, municipal corporations, townships, other political subdivisions of the state, or agencies of the state or any of its political subdivisions, or under the authority of charitable organizations that render services to the community or its citizens, in accordance with this division. Supervised community service work shall not be required as a condition of probation under this division unless the offender agrees to perform the supervised community service work offered as a condition of probation by the court. The court may require an offender who agrees to perform work under those circumstances to deposit with the court a reasonable fee to procure a policy or policies of liability insurance to cover the period of time during which the offender will perform the community service work. The supervised community service work that may be imposed as a condition of probation shall be subject to the following limitations:

(1) The court shall fix the period of community service work that is imposed as a condition of probation and distribute **[29]** the period over weekends or over other appropriate times that will allow the offender to continue at his occupation or to care for this family. The period of community service work fixed by the court and imposed as a condition of probation shall not exceed an aggregate of eighty hours.

(2) An agency, subdivision, or charitable organization must agree to accept the offender for community service work before the court requires him to perform work for it. The agency, subdivision,

or charitable organization shall be located in or be the municipal corporation or township of the offender's residence or domicile, if possible. If it is not possible to place the offender with an agency, subdivision, or charitable organization that is located in or that is the municipal corporation or township of his residence or domicile, the court may require the offender to perform community service work for an agency, subdivision, or charitable organization that is located within the jurisdiction of the court. A court shall not require an offender to perform community service work for an agency, subdivision, or charitable organization that is not reasonably near the location at which the offense occurred or near the municipal corporation or township of the offender's residence or domicile.

(3) Community service work that a court requires under this division shall be supervised by an official of the agency, subdivision, or charitable organization for which the work is performed or by a person designated by the agency, subdivision, or charitable organization. The official or designated person shall be qualified for the supervision by education, training, or experience, and shall periodically report, in writing, to the court and to the offender's probation officer concerning the conduct of the offender in performing the work.

Section 2951.03. No person who has pleaded guilty of TO or has been convicted of a felony shall be placed on probation until **[30]** a written report of investigation by a probation officer, THE VICTIM IMPACT STATEMENT PREPARED PURSUANT TO SECTION 2947.051 OF THE REVISED CODE, AND THE EVIDENCE AND OPINIONS PRESENTED BY THE VICTIM OR THE VICTIM'S FAMILY HAVE been considered by the court. The probation officer shall inquire into the circumstances of the offense, criminal record, social history, and present condition of the defendant. Such written report of investigation by the probation

officer shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders. Whenever the probation officer considers it advisable, such investigation may include a physical and mental examination of the defendant. If a defendant is committed to any institution, the report of such investigation shall be sent to the institution with the entry of commitment.

Section 2951.04. (A) If the court has reason to believe that an offender convicted of a felony or misdemeanor is a drug dependent person, or is in danger of becoming a drug dependent person, the court may, and when the offender has been convicted, the court shall advise the offender that he has a right to request conditional probation for purposes of treatment and rehabilitation.

(B) Within a reasonable time after receipt of the request for conditional probation, the court shall hold a hearing to determine if the offender is eligible for conditional probation. The offender is eligible for conditional probation if the court finds that:

(1) The offender is drug dependent or is in danger of becoming drug dependent and he may benefit from treatment;

(2) The offender has been accepted into an appropriate drug treatment facility or program. An appropriate facility or program for rehabilitation or treatment includes a special facility established by the director of mental health pursuant to section 5122.49 of the Revised Code, a program licensed by the director pursuant to section 5122.50 of the Revised Code, a [31] program certified by the the Revised Code.

(3) The offense was committed while the offender was armed with a firearm or dangerous

ordnance, as defined in section 2923.11 of the Revised Code.

(4) The offense involved is a violation of section 2907.02 or 2907.12 of the Revised Code.

(5) The offender is not eligible for probation or shock probation pursuant to division (C) of section 2903.06 or 2903.07 of the Revised Code or is sentenced to a term of actual incarceration.

(G) When an offender is convicted of a misdemeanor the court may offer to the offender, as a condition of probation that would be in addition to the required conditions of probation and the discretionary conditions of probation that may be imposed pursuant to division (C) of this section, that the offender be required to perform supervised community service work under the authority of health districts, park districts, counties, municipal corporations, townships, other political subdivisions of the state, or agencies of the state or any of its political subdivisions, or under the authority of charitable organizations that render services to the community or its citizens, in accordance with this division. Supervised community service work shall not be required as a condition of probation under this division unless the offender agrees to perform the supervised community service work offered as a condition of probation by the court. The court may require an offender who agrees to perform work under those circumstances to deposit with the court a reasonable fee to procure a policy or policies of liability insurance to cover the period of time during which the offender will perform the community service work. The supervised community service work that may be imposed as a condition of probation shall be subject to the following limitations:

(1) The court shall fix the period of community service work that is imposed as a condition of

probation and distribute [29] the period over weekends or over other appropriate times that will allow the offender to continue at his occupation or to care for this family. The period of community service work fixed by the court and imposed as a condition of probation shall not exceed an aggregate of eighty hours.

(2) An agency, subdivision, or charitable organization must agree to accept the offender for community service work before the court requires him to perform work for it. The agency, subdivision, or charitable organization shall be located in or be the municipal corporation or township of the offender's residence or domicile, if possible. If it is not possible to place the offender with an agency, subdivision, or charitable organization that is located in or that is the municipal corporation or township of his residence or domicile, the court may require the offender to perform community service work for an agency, subdivision, or charitable organization that is located within the jurisdiction of the court. A court shall not require an offender to perform community service work for an agency, subdivision, or charitable organization that is not reasonably near the location at which the offense occurred or near the municipal corporation or township of the offender's residence or domicile.

(3) Community service work that a court requires under this division shall be supervised by an official of the agency, subdivision, or charitable organization for which the work is performed or by a person designated by the agency, subdivision, or charitable organization. The official or designated person shall be qualified for the supervision by education, training, or experience, and shall periodically report, in writing, to the court and to the offender's probation officer concerning the conduct of the offender in performing the work.

Section 2951.03. No person who has pleaded guilty of TO or has been convicted of a felony shall be placed on probation until [30] a written report of investigation by a probation officer, THE VICTIM IMPACT STATEMENT PREPARED PURSUANT TO SECTION 2947.051 OF THE REVISED CODE, AND THE EVIDENCE AND OPINIONS PRESENTED BY THE VICTIM OR THE VICTIM'S FAMILY HAVE been considered by the court. The probation officer shall inquire into the circumstances of the offense, criminal record, social history, and present condition of the defendant. Such written report of investigation by the probation officer shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders. Whenever the probation officer considers it advisable, such investigation may include a physical and mental examination of the defendant. If a defendant is committed to any institution, the report of such investigation shall be sent to the institution with the entry of commitment.

Section 2951.04. (A) If the court has reason to believe that an offender convicted of a felony or misdemeanor is a drug dependent person, or is in danger of becoming a drug dependent person, the court may, and when the offender has been convicted, the court shall advise the offender that he has a right to request conditional probation for purposes of treatment and rehabilitation.

(B) Within a reasonable time after receipt of the request for conditional probation, the court shall hold a hearing to determine if the offender is eligible for conditional probation. The offender is eligible for conditional probation if the court finds that:

(1) The offender is drug dependent or is in danger of becoming drug dependent and he may benefit from treatment;

(2) The offender has been accepted into an appropriate drug treatment facility or program. An appropriate facility or program for rehabilitation or treatment includes a special facility established by the director of mental health pursuant to section 5122.49 of the Revised Code, a program licensed by the director pursuant to section 5122.50 of the Revised Code, a **[31]** program certified by the director pursuant to division (C) of section 5122.51 of the Revised Code, a public or private hospital, the veterans administration or other agencies of the federal government, or private care or treatment rendered by a physician or a psychologist licensed in the state.

(3) The offender has committed an offense for which probation may be granted in accordance with section 2951.02 of the Revised Code. For purposes of this section, the fact that an offender is a repeat offender as defined in section 2929.01 of the Revised Code shall not conclusively bar him from conditional probation authorized by this section if the offenses for which he has been convicted and for which he previously had been imprisoned involved violations of section 2925.11 or 2925.12 of the Revised Code or would have been violations of that section had it been in effect at the time of the violation.

(C) If the court finds that an offender is eligible for conditional probation, the court, AFTER CONSIDERATION OF THE VICTIM IMPACT STATEMENT PREPARED PURSUANT TO SECTION 2947.051 OF THE REVISED CODE AND THE EVIDENCE AND OPINIONS PRESENTED BY THE VICTIM OR VICTIM'S FAMILY, may suspend execution of the sentence imposed after completion of any period of actual incarceration which may be required by Chapter 2925. of the Revised Code, and place the offender on probation subject to Chapter 2951. of the Revised Code and under the

control and supervision of the county probation department or the adult parole authority.

Probation under this section shall be conditioned upon the offender's voluntary entrance into an appropriate treatment program or facility FACILITY and his faithful submission to the treatment prescribed for his drug dependence or danger of drug dependence and upon other conditions as the court orders.

The court shall not suspend execution of a sentence and place the offender on probation until the court affirmatively finds that the offender is not, or there is no substantial risk of his becoming, a dangerous offender as defined in section **[32]** 2929.01 of the Revised Code and such finding is entered into the record.

Probation granted under this section shall continue for such period as the court determines. The period of probation may be extended, but the total period of probation, whether for treatment or otherwise, shall not exceed five years.

(D) At such hearing provided for in division (B) of this section, the offender and the prosecuting attorney shall be afforded the opportunity to present evidence to establish his eligibility for probation under this section AND THE VICTIM OR THE VICTIM'S FAMILY, IF THE VICTIM DIED AS A RESULT OF THE OFFENSE, MAY APPEAR PERSONALLY OR THROUGH AN ATTORNEY TO PRESENT EVIDENCE AND OPINIONS ON THE OFFENDER'S SUITABILITY FOR PROBATION UNDER THIS SECTION.

Upon the request of the offender, and to aid the offender in establishing his eligibility for probation, the court may refer the offender for medical and psychiatric examination to the depart-

ment of mental health or to a state facility designated by the department, to a psychiatric clinic approved by the department, or to a program or facility described in division (B)(2) of this section. However, the psychiatric portion of a referral pursuant to this division shall be performed only by a court appointed individual who has not previously treated the offender or any member of his immediate family.

(E) Treatment of drug dependent persons or person in danger of becoming a drug dependent person place on probation under this section may include: hospitalization under close supervision or otherwise; release on an out patient OUTPATIENT status under supervision; and such other treatment or after-care as the appropriate treatment facility or program considers necessary or desirable to rehabilitate such person or person, including the continued maintenance of an existing drug dependence through the administration of methadone pursuant to section 3719.61 of the Revised code. An offender released from hospitalization or treatment but still subject to the term of [33] probation may be rehospitalized or returned to treatment at any time it becomes necessary.

(F) If, at any time after treatment has commenced, the appropriate treating facility or program reports to the probation officer that the offender is rehabilitated and further treatment is unnecessary, or that maximum benefit or treatment has been achieved, the offender shall be relieved of the condition of treatment, and the court may discharge him or place him on an additional period of probation, upon such conditions as the court considers necessary. if, at any time after treatment has commenced, the treating facility or program reports to the probation officer that the offender fails to submit to or follow the prescribed treatment, or becomes a discipline problem, the offender shall be arrested as provided in section 2951.08 of the

Revised Code and be removed from the treatment program or facility. Such failure and removal shall be considered by the court as a violation of the conditions of probation and dealt with according to law as in other cases of probation violation. At any time and for any appropriate reason, the offender, his probation officer, the authority or department that has the duty to control and supervise the offender as provided for in section 2951.05 of the Revised Code, or the treating facility or program may petition the court to reconsider, suspend, or modify its order for treatment concerning that person.

(G) The treating facility or program shall report to the authority or department who has the duty to control and supervise the offender as provided for in section 2951.05 of the Revised Code, at any periodic reporting period the court requires and whenever the offender is changed from an inpatient to an outpatient, is transferred to another treatment facility or program, fails to submit to or follow the prescribed treatment, becomes a discipline problem, is rehabilitated, or obtains the maximum benefit of treatment.

(H) Any offender placed on probation by the terms of this section shall be liable for expenses incurred during the course [34] of treatment and if the offender is treated in a benevolent institution under the jurisdiction of the department of mental health, he is subject to the provisions of Chapter 5121. of the Revised Code.

Section 2951.041. (A) If the court has reason to believe that an offender charged with a felony or misdemeanor is a drug dependent person or is in danger of becoming a drug dependent person, the court shall, prior to the entry of a plea, accept that offender's request for treatment in lieu of conviction. If the offender requests treatment in lieu of conviction, the court shall stay all criminal

proceedings pending the outcome of the hearing to determine whether the offender is a person eligible for treatment in lieu of conviction. At the conclusion of the hearing, the court shall enter its findings and accept the offender's plea.

(B) The offender is eligible for treatment in lieu of conviction if the court finds that:

(1) The offender's drug dependence or danger of drug dependence was a factor leading to the criminal activity with which he is charged, and rehabilitation through treatment would substantially reduce the likelihood of additional criminal activity;

(2) The offender has been accepted into an appropriate drug treatment facility or program. An appropriate facility or program for rehabilitation or treatment includes a special facility established by the director of mental health pursuant to section 5122.49 of the Revised Code, a program licensed by the director pursuant to section 5122.50 of the Revised Code, a program certified by the director pursuant to division (C) of section 5122.51 of the Revised code, a public or private hospital, the veterans administration or other agency of the federal government, or private care or treatment rendered by a physician or a psychologist licensed in the state;

(3) If the offender were convicted he would be eligible for probation under section 2951.02 of the Revised Code, except **[35]** that a finding of any of the criteria listed in divisions (D) and (F) of that section shall cause the offender to be conclusively ineligible for treatment in lieu of conviction;

(4) The offender is not a "repeat offender" or "dangerous offender" as defined in section 2929.01 of the Revised Code;

(5) The offender is not charged with any offense defined in section 2925.02, 2925.03, or 2925.21 of the Revised Code.

Upon such a finding and where the offender enters a plea if guilty or no contest, the court, AFTER CONSIDERATION OF THE VICTIM IMPACT STATEMENT PREPARED PURSUANT TO SECTION 2947.051 OF THE REVISED CODE AND THE EVIDENCE AND OPINIONS PRESENTED BY THE VICTIM OR THE VICTIM FAMILY, may stay all criminal proceedings and order the offender to a period of rehabilitation. Where a plea of not guilty is entered, a trial shall precede further consideration of the offender's request for treatment in lieu of conviction.

(C) The offender and the prosecuting attorney shall be afforded the opportunity to present evidence to establish eligibility for treatment in lieu of conviction, and the prosecutor may make a recommendation to the court concerning whether or not the offender should receive treatment in lieu of conviction. THE VICTIM OR THE VICTIM'S FAMILY, IF THE VICTIM DIED AS A RESULT OF THE OFFENSE, MAY APPEAR PERSONALLY OR THROUGH AN ATTORNEY TO PRESENT EVIDENCE AND OPINIONS ON THE OFFENDER'S SUITABILITY FOR TREATMENT IN LIEU OF CONVICTION. Upon the request of the offender and to aid the offender in establishing his eligibility for treatment in lieu of conviction, the court may refer the offender for medical and psychiatric examination to the department of mental health or to a state facility designated by the department, to a psychiatric clinic approved by the department, or to a program or facility described in division (B)(2) of this section. However, the psychiatric portion of an examination pursuant to a referral under this division shall be performed only by a court appointed individual who has not **[36]**

previously treated the offender or a member of his immediate family.

(C) An offender found to be eligible for treatment in lieu of conviction and ordered to a period of rehabilitation shall be placed under the control and supervision of the county probation department or the adult parole authority as provided in Chapter 2951. of the Revised Code as if he were on probation. The court shall order a period of rehabilitation to continue for such period as the judge or magistrate determines which may be extended but the total period shall not exceed three years. The period of rehabilitation shall be conditioned upon the offender's voluntary entrance into an appropriate treatment facility or program, faithful submission to prescribed treatment, and upon such other conditions as the court orders.

(E) Treatment of a person ordered to a period of rehabilitation under this section may include hospitalization under close supervision or otherwise, release on an out-patient status under supervision, and such other treatment or after-care as the appropriate treatment facility or program considers necessary or desirable to rehabilitate such person. Persons released from hospitalization or treatment but still subject to the ordered term of rehabilitation may be rehospitalized or returned to treatment at any time it becomes necessary for their treatment and rehabilitation.

(F) If the treating facility or program reports to the probation officer that the offender has successfully completed treatment and is rehabilitated, the court may dismiss the charges pending against the offender. If the treating facility or program reports that the offender has successfully completed treatment and is rehabilitated or has obtained maximum benefits from the treatment program, and that the offender completes the period of rehabilitation and other conditions ordered by the

court, the court shall dismiss the charges pending against the offender. if the treating facility or program reports that the offender has failed treatment, or if the offender does not [37] satisfactorily complete the period of rehabilitation or the other conditions ordered by the court, the court may take such actions as it considers appropriate. Upon violation of the conditions of the period of rehabilitation, the court may enter an adjudication of guilt and proceed as otherwise provided. If at any time after treatment has commenced, the treating facility or program reports that the offender fails to submit to or follow the prescribed treatment, the offender shall be arrested as provided in section 2951.08 of the Revised Code and removed from the treatment program or facility. Such failure and removal shall be considered by the court as a violation of the conditions of the period of rehabilitation and dealt with according to law as in cases of probation violation. At any time and for any appropriate reason, the offender, his probation officer, the authority or department that has the duty to control and supervise the offender as provided for in section 2951.05 of the Revised Code, or the treating facility or program may petition the court to reconsider, suspend, or modify its order for treatment concerning that person.

(G) The treating facility or program shall report to the authority or department who has the duty to control and supervise the offender as provided for in section 2951.05 of the Revised Code, at any periodic reporting period the court requires and whenever the offender is changed from an inpatient to an outpatient, is transferred to another treatment facility or program, fails to submit to or follow the prescribed treatment, becomes a discipline problem, is rehabilitated, or obtains the maximum benefit of treatment.

(H) If, on the offender's motion, the court finds that the offender has successfully completed

the period of rehabilitation ordered by the court, is rehabilitated, is no longer drug dependent or in danger of becoming drug dependent, and has completed all other conditions, the court shall dismiss the proceeding against him. Successful completed all other conditions, the court shall dismiss the proceeding against him. Successful completion of a period of rehabilitation under this section shall be without adjudication **[38]** of guilt and is not a criminal conviction for purposes of disqualifications or disabilities imposed by law and upon conviction of a crime, and the court may order the expungement of records in the manner provided in sections 2953.31 to 2953.36 of the Revised Code.

(I) An order denying treatment in lieu of conviction under this section shall not be construed to prevent conditional probation under section 2951.04 of the Revised Code.

(J) Any person ordered to treatment by the terms of this section shall be liable for expenses incurred during the course of treatment and if he is treated in a benevolent institution under the jurisdiction of the department of mental health, he is subject to the provisions of Chapter 5121. of the Revised Code.

(K) An offender charged with a drug abuse offense, other than a minor misdemeanor involving marihuana and otherwise eligible for treatment in lieu of conviction may request and may be ordered to a period of rehabilitation even though the findings required by divisions (B)(1) and (2) of this section are not made. An order to rehabilitation under this division shall be subject to such conditions as the court requires but shall not be conditioned upon entry into an appropriate treatment program or facility.

Section 2967.12. At least three weeks before the adult parole authority recommends any pardon or

commutation of sentence, or grants any parole, notice of the pendency of such matter THE PARDON, COMMUTATION, OR PAROLE, setting forth the name of the person on whose behalf it is made, the crime of which he was convicted, the time of conviction, and the term of sentence, shall be sent to the prosecuting attorney and the judge of the court of common pleas of the county in which the indictment against the convict was found AND TO THE VICTIM OR THE VICTIM'S FAMILY, IF THE VICTIM DIED AS A RESULT OF THE CONVICT'S OFFENSE. Where IF there is more than one such judge the notice shall be sent to the presiding judge of said county THE COURT. When notice of the pendency of any such manner PARDON, COMMUTATION, OR PAROLE **[39]** has been given as provided in this section, and hearing on the matter PARDON, COMMUTATION, OR PAROLE is continued to a date certain, notice of the further consideration of such matter THE PARDON, COMMUTATION, OR PAROLE shall be given by mail to the proper judge and prosecuting attorney AND THE VICTIM OR THE VICTIM'S FAMILY at least ten days before such THE further consideration.

THE NOTICE TO THE VICTIM OR THE VICTIM'S FAMILY SHALL STATE THAT THE VICTIM OR THE VICTIM'S FAMILY MAY APPEAR PERSONALLY OR THROUGH AN ATTORNEY TO PRESENT EVIDENCE AND OPINIONS ON WHETHER THE CONVICT SHOULD BE PARDONED OR PAROLED OR HAVE HIS SENTENCE COMMUTED.

In case of an application for the pardon or commutation of sentence of a person sentenced to capital punishment, the governor may modify the requirements of such notification and publication if there is not sufficient time for compliance therewith before the date fixed for the execution of sentence.

Section 2967.31. Notwithstanding any other provision for determining parcel eligibility, a prisoner confined in a state penal or reformatory institution. AFTER CONSIDERATION OF THE EVIDENCE AND OPINIONS PRESENTED BY THE VICTIM OR THE VICTIM'S FAMILY PURSUANT TO DIVISION (d) OF SECTION 2947.051 OF THE REVISED CODE, may be released on parole at any time after serving six months in the custody of the department of rehabilitation and correction, when all of the following apply:

(A) The offense for which the prisoner was sentenced was an offense other than aggravated murder, murder, an aggravated felony of the first degree, an aggravated felony of the second degree, an aggravated felony of the third degree, or a felony of the first degree.

(B) The prisoner has not previously been convicted of any felony for which, pursuant to sentence, he was confined for thirty days or more in a penal or reformatory institution in this state or in a similar institution in any other sate or the United States.

[40] (C) The prisoner is not a dangerous offender as defined in section 2929.01 of the Revised Code.

(D) The prisoner does not need further confinement in a penal or reformatory institution for his correction or rehabilitation.

(E) The history, character, condition, and attitude of the prisoner indicate that he is likely to respond affirmatively to early release on parole, and is unlikely to commit another offense.

(F) The prisoner is not serving a term of actual incarceration.

(G) The prisoner is not ineligible for shock parole pursuant to division (C) of section 2903.06 or 2903.07 of the Revised Code.

Section 2. That existing sections 2151.35, 2151.355, 2151.38, 2929.03, 2929.11, 2929.12, 2929.14, 2947.051, 2951.02, 2951.03, 2951.04, 2951.041, 2967.12, and 2967.31 of the Revised Code are hereby repealed.

APPENDIX B

1984 Session Laws--Full Text

SUB. SENATE BILL 172
Eff. 9-26-84
(Certain provisions eff 7-1-87)

Passed 5-24-84 Approved by Governor 6-26-84
Filed 6-27-84 File No. 209
Chief Sponsor: Pfeiffer

To amend sections 2743.191, 2743.51, 2921.03, 2949.12, 2967.03, and 2967.12 and to enact sections 2151.211, 2921.04, 2939.121, 2943.041, 2945.04, 2945.07, 2945.451, 2969.01, 2969.02, 2969.03, 2969.04, 2969.05 and 2969.06 of the Revised Code to provide that when a person is charged with murder, aggravated vehicular homicide, felony vehicular homicide, an aggravated felony, or aggravated murder when capital punishment is not sought, the victim of the act that was the basis of the charge or a representative member of the family of a deceased victim of that act may, at the court's discretion, make a statement at any hearing or proceeding at which the charge is resolved without trial; to specify that when a person is charged with any such offense and the victim or a representative member of a deceased victim's family is present at a hearing or proceeding at which the charge is resolved without trial or is present at a trial on the charge, the court has to provide the victim or representative member with information on the future treatment of the person relative to the charge upon the request of the victim or representative member, and the Adult Parole Authority may have to notify the victim or the representative member prior to any pardon, commutation, or parole, inform him that he may submit a statement, and consider the statement; to

require all money received by an offender, or his agent or assignee, for accounts of an offense or stories or interviews that are of value because of an offense to be paid into a special account for payment of damages to victims of the offense; to establish the new offense of intimidation of a crime victim or witness; to authorize courts to issue victim or witness protection orders in criminal cases; to establish employment protection provisions for persons subpoenaed to appear at criminal or juvenile proceedings; and to amend sections 2949.12, 2967.08 and 2967.12 and repeal sections 2943.041 and 2945.07 of the Revised Code, effective July 1, 1987, in order to eliminate on that date the rights of the victim or the families of victims to make a statement at any hearing or proceeding at which a charge is resolved without trial and to receive information on the future treatment of the offender and be notified of any pending pardon, commutation, or parole.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 2743.191, 2743.51, 2921.03, 2949.12, 2967.03, and 2967.12 be amended and sections 2151.211, 2921.04, 2939.121, 2943.041, 2945.04, 2945.07, 2945.451, 2969.01, 2969.02, 2969.03, 2969.04, 2969.05, and 2969.06 of the Revised Code be enacted to read as follows:

2151.211 Employee's attendance at delinquency case under subpoena; employer may not penalize

Sec. 2151.211. NO EMPLOYER SHALL DISCHARGE OR TERMINATE FROM EMPLOYMENT, THREATEN TO DISCHARGE OR TERMINATE FROM EMPLOYMENT, OR OTHERWISE PUNISH OR PENALIZE ANY EMPLOYEE BECAUSE OF TIME LOST FROM REGULAR EMPLOYMENT AS A RESULT OF THE EMPLOYEE'S ATTENDANCE AT ANY PROCEEDING IN A DELINQUENCY CASE PURSUANT TO A SUBPOENA. THIS SECTION

GENERALLY DOES NOT REQUIRE AND SHALL NOT BE CONSTRUED TO REQUIRE AN EMPLOYER TO PAY AN EMPLOYEE FOR TIME LOST AS A RESULT OF ATTENDANCE AT ANY PROCEEDING IN A DELINQUENCY CASE. HOWEVER, IF AN EMPLOYEE IS SUBPOENAED TO APPEAR AT A PROCEEDING IN A DELINQUENCY CASE AND THE PROCEEDING PERTAINS TO AN OFFENSE AGAINST THE EMPLOYER OR AN OFFENSE INVOLVING THE EMPLOYEE DURING THE COURSE OF HIS EMPLOYMENT, THE EMPLOYER SHALL NOT DECREASE OR WITHHOLD THE EMPLOYEE'S PAY FOR ANY TIME LOST AS A RESULT OF COMPLIANCE WITH THE SUBPOENA. ANY EMPLOYER WHO KNOWINGLY VIOLATES THIS SECTION IS IN CONTEMPT OF COURT.

2743.191 Reparations special account; procedures for payment of awards by commissioners; publicity expenses

Sec. 2743.191. (A) There is hereby created a reparations special account in the state special revenue fund that shall be used only for the payment of awards of reparations that are granted by the court of claims commissioners, the compensation of the court of claims commissioners, the compensation of judges necessary to hear and determine appeals from the commissioners, the compensation of any personnel needed by the court of claims to administer sections 2743.51 to 2743.72 of the Revised Code, the compensation of witnesses as provided in division (B) of section 2743.65 of the Revised Code, other administrative costs of hearing and determining claims for an award of reparations by the court of claims commissioners and of hearing and determining appeals from the commissioners by the court of claims, THE COSTS OF ADMINISTERING SECTIONS 2969.01 TO

2969.06 OF THE REVISED CODE, the costs of investigation and recommendation as certified by the attorney general, and, subject to division (D) of section 2743.71 of the Revised Code, the costs associated with the printing and providing of information cards or other printed materials to law enforcement agencies and prosecuting authorities and with publicizing the availability of awards of reparations pursuant to section 2743.71 of the Revised Code. All costs paid pursuant to section 2743.70 of the Revised Code, all appropriations that are made to the auditor of state for the payment of awards of reparations, and all moneys collected by the state pursuant to its right of subrogation provided in section 2743.72 of the Revised Code shall be deposited in the reparations special account.

(B) In making an award of reparations, a single commissioner or a panel of court of claims commissioners shall render the award against the state and the auditor of state as its agency for payment of the award. The award shall be accomplished only through the following procedure, which may be enforced by writ of mandamus directed to the appropriate official:

[2] (1) The clerk of the court of claims shall forward a certified copy of the order granting the award to the auditor of state and the office of budget and management.

(2) Upon receipt of the certified copy of the order granting the award from the clerk of the court of claims pursuant to division (B)(1) of this section and of the certificate of the office of budget and management pursuant to division (B)(3) of this section, the auditor of state shall draw a warrant on the treasurer of state payable to the claimant, to an assignee of the claimant, or to the claimant and his assignee in the amount of the award set forth in the certified copy of the order.

(3) The expense shall be charged against available unencumbered moneys in the reparations special account. The availability of unencumbered

moneys shall be certified to the auditor of state by the office of budget and management prior to the drawing of the warrant. If the award is to be paid in installments, the office of budget and management shall certify only the amount of the award that will fall due during the current appropriation period.

(4) If the office of budget and management determines that sufficient unencumbered moneys do not exist in the reparations special account, it shall make application for payment of the award out of the emergency purposes appropriations account or any other appropriation for emergencies or contingencies and payment out of this account or other appropriation shall be authorized if there are sufficient moneys greater than the sum total of then pending emergency purposes fund requests or requests for releases from the other appropriations.

(5) If sufficient moneys do not exist in the emergency purposes appropriations account or any other appropriation for emergencies or contingencies to pay the award, the auditor of state shall request the general assembly to make an appropriation sufficient to pay the award, and no warrant shall be drawn until the office of budget and management certifies to the auditor of state that the appropriation has been made. The auditor of state shall make this appropriation request during the current biennium and during each succeeding biennium until a sufficient appropriation is made. If, prior to the time that an appropriation is made by the general assembly pursuant to this division, the reparations special account has sufficient unencumbered funds to pay the award or part of the award, the available funds shall be used to pay the award or part of the award, and the appropriation request shall be amended to request only sufficient funds to pay that part of the award that is unpaid.

(C) No order granting an award may be forwarded by the clerk of the court of claims to the

auditor of state or the office of budget and management until all appeals have been determined and all rights to appeal exhausted, except as otherwise provided in this section. If any party to a claim for an award of reparation appeals from only a portion of an award, and a remaining portion provides for the payment of money by the state, a certified copy of the order, together with a copy of the notice of appeal, shall be forwarded to the auditor of state and the office of budget and management, and that part of the award calling for the payment of money by the state and not a subject of the appeal shall be processed for payment as described in this section.

2743.51 Definitions

Sec. 2743.51. As used in sections 2743.51 to 2743.72 of the Revised Code:

(A) "Claimant" means any of the following persons who claim an award of reparations under sections 2743.51 to 2743.71 of the Revised Code:

(1) A victim who was one of the following at the time of the criminally injurious conduct:

(a) A resident of this state;

(b) A resident of a state, district, territory, or foreign country the laws of which permit residents of this state to recover compensation as victims of offenses committed in that state, district, territory or country;

(2) A dependent of a deceased victim who is described in division (A)(1) of this section;

(3) A third person, other than a collateral source, who legally assumes or voluntarily pays the obligations of a victim, or of a dependent of a victim, who is described in division (A)(1) of this section, which obligations are incurred as a result of the criminally injurious conduct that is the subject of the claim and may include, but are not limited to, medical or burial expenses;

(4) A person who is authorized to act on behalf of any person who is described in division (A)(1), (2), or (3) of this section.

(B) "Collateral source" means a source of benefits or advantages for economic loss otherwise reparable that the victim or claimant has received, or that is readily available to him, from any of the following sources:

(1) The offender;

(2) The government of the United States or any of its agencies, a state or any of its political subdivisions, or an instrumentality of two or more states, unless the law providing for the benefits or advantages makes them excess or secondary to benefits under sections 2743.51 to 2742.72 of the Revised Code;

(3) Social security, medicare, and medicaid;

(4) State-required, temporary, nonoccupational disability insurance;

(5) Workers' compensation;

(6) Wage continuation programs of any employer;

(7) Proceeds of a contract of insurance payable to the victim for loss that he sustained because of the criminally injurious conduct;

(8) A contract providing prepaid hospital and other health care services, or benefits for disability;

(9) That portion of the proceeds of all contracts of insurance payable to the claimant on account of the death of the victim that exceeds fifty thousand dollars.

"COLLATERAL SOURCE" DOES NOT INCLUDE ANY MONEY, OR THE MONETARY VALUE OF ANY PROPERTY, THAT IS SUBJECT TO SECTIONS 2969.01 TO 2969.06 OF THE REVISED CODE.

(C) "Criminally injurious conduct" means conduct that occurs or is attempted in this state; poses a substantial threat of personal injury or death; and is punishable by fine, imprisonment, or death, or would be so punishable but for the fact

that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state. Criminally injurious conduct does not include conduct arising out of the ownership, maintenance, or use of a motor vehicle, except when the person engaging in the conduct intended to cause personal injury or death or when the person engaging in the conduct was using the vehicle to flee immediately after committing a felony or an act that would constitute a felony but for the fact that the person engaging in the conduct lacked the capacity to commit the felony under the laws of this state.

(D) "Dependent" means an individual wholly or partially dependent upon the victim for care and support, and includes a child of the victim born after his death.

(E) "Economic loss" means economic detriment consisting only of allowable expense, work loss, funeral expense, and replacement services loss. If criminally injurious conduct causes death, economic loss includes a dependent's economic loss and a dependent's replacement services loss. Noneconomic detriment is not economic loss; however, economic loss may be caused by pain and suffering or physical impairment.

(F) "Allowable expense" means reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation, rehabilitative occupational training, and other remedial treatment and care. It does not include that portion of a charge for a room in a hospital, clinic, convalescent home, nursing home, or any other institution engaged in providing nursing care and related services in excess of a reasonable and customary charge for semiprivate accommodations, unless accommodations other than semiprivate accommodations are medically required.

(G) "Work loss" means loss of income from work that the injured person would have performed if he had not been injured and expenses reasonably

incurred by him to obtain services in lieu of those he would have performed for income, reduced by any income from substitute work actually performed by him, or by income he would have earned in available appropriate substitute work that he was capable of performing but unreasonably failed to undertake.

(H) "Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income, but for the benefit of himself or his family, if he had not been injured.

(I) "Dependent's economic loss" means loss after a victim's death of contributions of things of economic value to his dependents, not including services they would have received from the victim if he had not suffered the fatal injury, less expenses of the dependents avoided by reason of the victim's death.

[3] (J) "Dependent's replacement services loss" means loss reasonably incurred by dependents after a victim's death in obtaining ordinary and necessary services in lieu of those the victim would have performed for their benefit if he had not suffered the fatal injury, less expenses of the dependents avoided by reason of the victim's death not subtracted in calculating dependent's economic loss.

(K) "Noneconomic detriment" means pain, suffering, inconvenience, physical impairment, or other nonpecuniary damage.

(L) "Victim" means a person who suffers personal injury or death a result of any of the following:

(1) Criminally injurious conduct;

(2) The good faith effort of any person to prevent criminally injurious conduct;

(3) The good faith effort of any person to apprehend a person suspected of engaging in criminally injurious conduct.

(M) "Contributory misconduct" means any conduct of the claimant or the victim through whom the claimant claims an award of reparations that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has a causal relationship to the criminally injurious conduct that is the basis of the claim.

(N) "Funeral expense" means any reasonable charges that are not in excess of one thousand two hundred fifty dollars and that are incurred for expenses directly related to the victim's funeral, cremation, or burial.

2921.03 Intimidation

Sec. 2921.03. (A) No person, knowingly and by force or by unlawful threat of harm TO ANY PERSON OR PROPERTY, shall attempt to influence, intimidate, or hinder a public servant, party official, or witness in the discharge of his duty.

(B) Whoever violates this section is guilty of intimidation, a felony of the third degree.

2921.04 Intimidation of crime victim or witness

Sec. 2921.04. (A) NO PERSON SHALL KNOWINGLY ATTEMPT TO INTIMIDATE OR HINDER THE VICTIM OF A CRIME IN THE FILING OR PROSECUTION OF CRIMINAL CHARGES, OR A WITNESS IN A CRIMINAL CASE IN THE DISCHARGE OF HIS DUTY.

(B) NO PERSON, KNOWINGLY AND BY FORCE OR BY UNLAWFUL THREAT OF HARM TO ANY PERSON OR PROPERTY, SHALL ATTEMPT TO INFLUENCE, INTIMIDATE, OR HINDER THE VICTIM OF A CRIME IN THE FILING OR PROSECUTION OF CRIMINAL CHARGES, OR A WITNESS IN A CRIMINAL CASE IN THE DISCHARGE OF HIS DUTY.

(C) DIVISION (A) OF THIS SECTION DOES NOT APPLY TO ANY PERSON WHO IS ATTEMPTING TO RESOLVE A DISPUTE PERTAINING TO THE ALLEGED COMMISSION OF A CRIMINAL OFFENSE, EITHER PRIOR TO OR SUBSEQUENT TO THE FILING OF A COMPLAINT, OR WHO IS ATTEMPTING TO ARBITRATE OR ASSIST IN THE CONCILIATION OF ANY SUCH DISPUTE, EITHER PRIOR TO OR SUBSEQUENT TO THE FILING OF A COMPLAINT.

(D) WHOEVER VIOLATES THIS SECTION IS GUILTY OF INTIMIDATION OF A CRIME VICTIM OR WITNESS. VIOLATION OF DIVISION (A) OF THIS SECTION IS A MISDEMEANOR OF THE FIRST DEGREE. VIOLATION OF DIVISION (B) OF THIS SECTION IS A FELONY OF THE THIRD DEGREE.

2939.121 Employee's attendance before grand jury under subpoena; employer may not penalize

Sec. 2939.121. NO EMPLOYER SHALL DISCHARGE OR TERMINATE FROM EMPLOYMENT, THREATEN TO DISCHARGE OR TERMINATE FROM EMPLOYMENT, OR OTHERWISE PUNISH OR PENALIZE ANY EMPLOYEE BECAUSE OF TIME LOST FROM REGULAR EMPLOYMENT AS A RESULT OF THE EMPLOYEE'S ATTENDANCE AT ANY PROCEEDING BEFORE A GRAND JURY PURSUANT TO A SUBPOENA. THIS SECTION GENERALLY DOES NOT REQUIRE AND SHALL NOT BE CONSTRUED TO REQUIRE AN EMPLOYER TO PAY AN EMPLOYEE FOR TIME LOST RESULTING FROM ATTENDANCE AT ANY GRAND JURY PROCEEDING. HOWEVER, IF AN EMPLOYEE IS SUBPOENAED TO APPEAR AT A GRAND JURY PROCEEDING AND THE PROCEEDING PERTAINS TO AN OFFENSE AGAINST THE

EMPLOYER OR AN OFFENSE INVOLVING THE EMPLOYEE DURING THE COURSE OF HIS EMPLOYMENT, THE EMPLOYER SHALL NOT DECREASE OR WITHHOLD THE EMPLOYEE'S PAY FOR ANY TIME LOST AS A RESULT OF COMPLIANCE WITH THE SUBPOENA. ANY EMPLOYER WHO KNOWINGLY VIOLATES THIS SECTION IS IN CONTEMPT OF COURT.

2943.041 Rights of crime victim in regard to prosecution of defendant

Sec. 2943.041. (A) IN ANY CASE IN WHICH A PERSON IS CHARGED WITH A VIOLATION OF SECTION 2903.02, 2903.03, 2903.04, 2903.06, 2903.11, 2905.01, 2905.02, 2905.11, 2907.02, 2907.12, 2909.02, 2911.01, 2911.02, 2911.11, OR 2911.12 OF THE REVISED CODE, A VIOLATION OF SECTION 2903.01 OF THE REVISED CODE IN WHICH THE INDICTMENT OR COUNT IN THE INDICTMENT DOES NOT CONTAIN ONE OR MORE SPECIFICATIONS OF AGGRAVATING CIRCUMSTANCES LISTED IN DIVISION (A) OF SECTION 2929.04 OF THE REVISED CODE, OR A FELONY VIOLATION OF SECTION 2903.07 OF THE REVISED CODE, IF THE CHARGE IS RESOLVED WITHOUT TRIAL THROUGH THE ENTRY OF A NOLLE PROSEQUI, THROUGH THE ENTRY OF A PLEA OF GUILTY OR NO CONTEST, OR THROUGH ANY OTHER FINAL DISPOSITION OTHER THAN BY TRIAL, THE COURT SHALL DETERMINE WHETHER THE VICTIM OF THE ACT THAT WAS THE BASIS OF THE CHARGE, OR A REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY IF THE VICTIM DIED AS A RESULT OF THAT ACT, IS PRESENT AT THE HEARING OR PROCEEDING AT WHICH THE CHARGE IS RESOLVED. IF THE COURT DETERMINES THAT THE VICTIM OR A REPRESENTATIVE

MEMBER OF THE VICTIM'S FAMILY IS PRESENT AT THE HEARING OR PROCEEDING, THE COURT SHALL REQUIRE THE VICTIM'S OR REPRESENTATIVE FAMILY MEMBER'S NAME AND THE FACT THAT HE WAS PRESENT AT THE HEARING OR PROCEEDING TO BE INDICATED IN THE RECORD OF THE CASE AND SHALL PROVIDE THE VICTIM OR REPRESENTATIVE FAMILY MEMBER WITH THE WRITTEN NOTICE DESCRIBED IN DIVISION (B) OF THIS SECTION. THE COURT, IN ITS DISCRETION AND SUBJECT TO ANY TERMS AND CONDITIONS IT IMPOSES, MAY PERMIT THE VICTIM OR REPRESENTATIVE FAMILY MEMBER TO PERSONALLY MAKE A STATEMENT RELATIVE TO THE VICTIMIZATION AND, IF APPLICABLE, THE SENTENCING OF THE OFFENDER. IF A VICTIM OR REPRESENTATIVE MEMBER OF A VICTIM'S FAMILY PERSONALLY MAKES A STATEMENT UNDER AUTHORITY OF THIS DIVISION, THE NAME OF THE VICTIM OR REPRESENTATIVE FAMILY MEMBER AND THE FACT THAT SUCH A STATEMENT WAS MADE SHALL BE INDICATED IN THE RECORD OF THE CASE.

(B)(1) IN ANY CASE IN WHICH A PERSON IS CHARGED WITH ANY VIOLATION DESCRIBED IN DIVISION (A) OF THIS SECTION, IF THE COURT DETERMINES THAT THE VICTIM OF THE ACT THAT WAS THE BASIS OF THE CHARGE, OR A REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY IF THE VICTIM DIED AS A RESULT OF THAT ACT, IS PRESENT AT A HEARING OR PROCEEDING OF THE TYPE DESCRIBED IN DIVISION (A) OF THIS SECTION AND REGARDLESS OF WHETHER THE VICTIM OR REPRESENTATIVE FAMILY MEMBER MAKES OR IS PERMITTED TO MAKE A STATEMENT AT THE HEARING OR

PROCEEDING, THE COURT SHALL PROVIDE THE VICTIM OR REPRESENTATIVE FAMILY MEMBER WITH WRITTEN NOTICE OF ALL OF THE FOLLOWING:

(a) THE NAME OF THE PERSON CHARGED WITH THE VIOLATION;

(b) THE CASE OR DOCKET NUMBER ASSIGNED TO THE CHARGE;

(c) A TELEPHONE NUMBER OR NUMBERS THAT THE VICTIM OR REPRESENTATIVE FAMILY MEMBER MAY CALL IN THE FUTURE, DURING NORMAL BUSINESS HOURS, FOR INFORMATION ABOUT THE FINAL RESOLUTION OF THE CHARGE; ABOUT ANY SENTENCE IMPOSED UPON THE OFFENDER RELATIVE TO THAT CHARGE, OR, IF THAT CHARGE IS DISMISSED AND THE PERSON ENTERS A PLEA OF GUILTY OR NO CONTEST TO A CHARGE OF ANY OFFENSE BASED ON OR CONNECTED WITH THE ACT THAT WAS THE BASIS OF THAT CHARGE OR TO A CHARGE OF ANY OFFENSE THAT WAS JOINED [4] FOR PROSECUTION WITH THAT CHARGE, ABOUT ANY SENTENCE IMPOSED RELATIVE TO THAT PLEA; AND ABOUT ANY ACTION TAKEN IN RELATION TO ANY SUCH SENTENCE, INCLUDING WHETHER IT HAS BEEN SUSPENDED, AND THE OFFENDER HAS BEEN PLACED ON PROBATION, WHETHER THE OFFENDER HAS BEEN GRANTED A FURLOUGH, WHETHER THE OFFENDER HAS BEEN PARDONED OR PAROLED OR HAS HAD HIS SENTENCE COMMUTED, AND WHETHER ANY OTHER ACTION HAS BEEN TAKEN THAT HAS RESULTED OR WILL RESULT IN THE OFFENDER'S RELEASE FROM IMPRISONMENT PRIOR TO THE EXPIRATION OF THAT SENTENCE.

(2) A NOTICE REQUIRED BY DIVISION (B)(1) OF THIS SECTION ALSO SHALL

INDICATE THAT IF THE PERSON CHARGED WITH THE VIOLATION IS SENTENCED AND HIS SENTENCE REQUIRES THAT HE SERVE A TERM OF IMPRISONMENT IN A STATE PENAL OR REFORMATORY INSTITUTION, THE VICTIM OR THE REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY MAY PROVIDE THE ADULT PAROLE AUTHORITY WITH A MEMORANDUM INCLUDING BOTH AN ADDRESS AND TELEPHONE NUMBER AT WHICH NOTICE CAN BE PROVIDED TO HIM AND THE NAME OF THE OFFENDER, AND THAT IF SUCH A MEMORANDUM IS PROVIDED, THE VICTIM OR REPRESENTATIVE FAMILY MEMBER WILL BE NOTIFIED BY THE ADULT PAROLE AUTHORITY BEFORE THE OFFENDER IS RECOMMENDED FOR A PARDON OR COMMUTATION OR IS GRANTED A PAROLE, THE VICTIM OR REPRESENTATIVE FAMILY MEMBER, AFTER RECEIPT OF SUCH A NOTIFICATION, MAY SEND A WRITTEN STATEMENT RELATIVE TO THE VICTIMIZATION AND THE PENDING ACTION TO THE ADULT PAROLE AUTHORITY, AND THE ADULT PAROLE AUTHORITY WILL CONSIDER ANY SUCH STATEMENT PRIOR TO RECOMMENDING A PARDON OR COMMUTATION FOR OR GRANTING A PAROLE TO THE OFFENDER. THE NOTICE REQUIRED BY DIVISION (B)(1) OF THIS SECTION SHALL INCLUDE AN ADDRESS AND TELEPHONE NUMBER FOR THE ADULT PAROLE AUTHORITY.

(3) THE COURT SHALL ENSURE THAT THE NOTICE REQUIRED BY DIVISION (B)(1) OF THIS SECTION IS PROVIDED TO A PARTICULAR VICTIM OR A REPRESENTATIVE MEMBER OF HIS FAMILY NO LATER THAN THE DATE OF THE SENTENCING OF THE PERSON CHARGED WITH COMMITTING AN OFFENSE AGAINST

THAT VICTIM. IF A VICTIM OR REPRESENTATIVE MEMBER OF A DECEASED VICTIM'S FAMILY WHO IS PROVIDED THE NOTICE REQUIRED BY DIVISION (B)(1) OF THIS SECTION CALLS A TELEPHONE NUMBER, DURING NORMAL BUSINESS HOURS, THAT THE NOTICE INDICATES MAY BE CALLED FOR INFORMATION, AND IDENTIFIES HIMSELF, THE PERSON CHARGED WITH THE VIOLATION DESCRIBED IN DIVISION (A) OF THIS SECTION, AND THE CASE OR DOCKET NUMBER ASSIGNED TO THE OFFENSE OR COUNT CHARGED, THE VICTIM OR THE REPRESENTATIVE FAMILY MEMBER SHALL BE INFORMED OF THE FINAL RESOLUTION OF THE CHARGE, AND, IF APPLICABLE, ANY SENTENCE IMPOSED UPON THE PERSON RELATIVE TO THAT CHARGE OR RELATIVE TO A PLEA TO A CHARGE BASED ON OR CONNECTED WITH THAT CHARGE OR A PLEA TO A CHARGE THAT WAS JOINED FOR PROSECUTION WITH THAT CHARGE, AND ANY ACTION TAKEN IN RELATION TO ANY SUCH SENTENCE.

(C) IF A COURT ORDERS A STATEMENT MADE AT A HEARING OR PROCEEDING UNDER AUTHORITY OF DIVISION (A) OF THIS SECTION, BY A VICTIM OR A REPRESENTATIVE MEMBER OF A VICTIM'S FAMILY TO BE TRANSCRIBED OR RECORDED AND IF THE PERSON WHO WAS CHARGED WITH THE VIOLATION DESCRIBED IN DIVISION (A) OF THIS SECTION IS SENTENCED TO SERVE A TERM OF IMPRISONMENT IN A STATE PENAL OR REFORMATORY INSTITUTION RELATIVE TO THAT CHARGE OR RELATIVE TO A PLEA TO A CHARGE BASED ON OR CONNECTED WITH THAT CHARGE OR A PLEA TO A CHARGE THAT WAS JOINED FOR PROSECUTION WITH THAT CHARGE, THE

TRANSCRIBED OR RECORDED STATEMENT SHALL BE SENT TO THE ADULT PAROLE AUTHORITY AND SHALL NOT BE INCLUDED IN ANY RECORD AT THE INSTITUTION IN WHICH THE PERSON IS INCARCERATED. THE ADULT PAROLE AUTHORITY SHALL MAINTAIN A FILE OF TRANSCRIPTS AND RECORDINGS IT IS SENT UNDER THIS DIVISION.

(D) THE FAILURE OF A COURT TO COMPLY WITH THE PROVISIONS OF THIS SECTION DOES NOT GIVE, AND SHALL NOT BE CONSTRUED AS GIVING, ANY RIGHTS OR ANY GROUNDS FOR APPEAL OR POST-CONVICTION RELIEF TO THE DEFENDANT IN THE CASE.

2545.04 Protective orders available if it is found likely that intimidation of crime victim or witness will occur; procedures; contempt of court

Sec. 2945.04. (A) IF A MOTION IS FILED WITH A COURT BEFORE WHICH A CRIMINAL CASE IS PENDING ALLEGING THAT A PERSON HAS COMMITTED OR IS REASONABLY LIKELY TO COMMIT ANY ACT PROHIBITED BY SECTION 2921.04 OF THE REVISED CODE IN RELATION TO THE CASE, THE COURT HOLDS A HEARING ON THE MOTION, AND THE COURT DETERMINES THAT THE ALLEGATIONS MADE IN THE MOTION ARE TRUE, THE COURT MAY ISSUE AN ORDER DOING ANY OR ANY COMBINATION OF THE FOLLOWING, SUBJECT TO DIVISION (B) OF THIS SECTION:

(1) DIRECTING THE DEFENDANT IN THE CASE NOT TO VIOLATE OR TO CEASE A VIOLATION OF SECTION 2921.04 OF THE REVISED CODE;

(2) DIRECTING A PERSON OTHER THAN A DEFENDANT WHO IS BEFORE THE

COURT, INCLUDING, BUT NOT LIMITED TO, A SUBPOENAED WITNESS OR OTHER PERSON ENTERING THE COURTROOM OF THE COURT NOT TO VIOLATE OR TO CEASE A VIOLATION OF SECTION 2921.04 OF THE REVISED CODE;

(3) DIRECTING THE DEFENDANT OR A PERSON DESCRIBED IN DIVISION (A)(2) OF THIS SECTION TO MAINTAIN A PRESCRIBED GEOGRAPHIC DISTANCE FROM ANY SPECIFIED PERSON WHO IS BEFORE THE COURT, INCLUDING, BUT NOT LIMITED TO, THE VICTIM OF THE OFFENSE THAT IS THE BASIS OF THE CASE OR A SUBPOENAED WITNESS IN THE CASE;

(4) DIRECTING THE DEFENDANT OR A PERSON DESCRIBED IN DIVISION (A)(2) OF THIS SECTION NOT TO COMMUNICATE WITH ANY SPECIFIED PERSON WHO IS BEFORE THE COURT, INCLUDING, BUT NOT LIMITED TO, THE VICTIM OF THE OFFENSE OR A SUBPOENAED WITNESS IN THE CASE;

(5) DIRECTING A SPECIFIED LAW ENFORCEMENT AGENCY THAT SERVES A POLITICAL SUBDIVISION WITHIN THE TERRITORIAL JURISDICTION OF THE COURT TO PROVIDE PROTECTION FOR ANY SPECIFIED PERSON WHO IS BEFORE THE COURT, INCLUDING, BUT NOT LIMITED TO, THE VICTIM OF THE OFFENSE OR A SUBPOENAED WITNESS IN THE CASE;

(6) ANY OTHER REASONABLE ORDER THAT WOULD ASSIST IN PREVENTING OR CAUSING THE CESSATION OF A VIOLATION OF SECTION 2921.04 OF THE REVISED CODE.

(B) NO ORDER ISSUED UNDER AUTHORITY OF DIVISION (A) OF THIS SECTION SHALL PROHIBIT OR BE CONSTRUED AS PROHIBITING ANY ATTORNEY FOR THE DEFENDANT IN THE CASE OR FOR A PERSON DESCRIBED IN DIVISION (A)(2) OF THIS SECTION FROM

CONDUCTING ANY INVESTIGATION OF THE PENDING CRIMINAL CASE, FROM PREPARING OR CONDUCTING ANY DEFENSE OF THE PENDING CRIMINAL CASE, OR FROM ATTEMPTING TO ZEALOUSLY REPRESENT HIS CLIENT IN THE PENDING CRIMINAL CASE WITHIN THE BOUNDS OF THE LAW. HOWEVER, THIS DIVISION DOES NOT EXEMPT ANY PERSON FROM THE PROHIBITIONS CONTAINED IN SECTION 2921.04 OF THE REVISED CODE OR PROVIDE A DEFENSE TO A CHARGE OF ANY VIOLATION OF THAT SECTION.

(C) A PERSON WHO VIOLATES AN ORDER ISSUED PURSUANT TO DIVISION (A) OF THIS SECTION IS SUBJECT TO THE FOLLOWING SANCTIONS:

(1) CRIMINAL PROSECUTION FOR A VIOLATION OF SECTION 2921.04 OF THE REVISED CODE, IF THE VIOLATION OF THE COURT ORDER CONSTITUTES A VIOLATION OF THAT SECTION;

(2) PUNISHMENT FOR CONTEMPT OF COURT;

(D) THE PUNISHMENT OF A PERSON FOR CONTEMPT OF COURT FOR VIOLATION OF AN ORDER [5] ISSUED PURSUANT TO DIVISION (A) OF THIS SECTION DOES NOT BAR CRIMINAL PROSECUTION OF THE PERSON FOR A VIOLATION OF SECTION 2921.04 OF THE REVISED CODE. HOWEVER, A PERSON PUNISHED FOR CONTEMPT OF COURT IS ENTITLED TO CREDIT FOR THE PUNISHMENT IMPOSED UPON CONVICTION OF A VIOLATION OF THAT SECTION, AND A PERSON CONVICTED OF A VIOLATION OF THAT SECTION SHALL NOT SUBSEQUENTLY BE PUNISHED FOR CONTEMPT OF COURT ARISING OUT OF THE SAME ACTIVITY.

2945.07 Recording presence of crime victim or member of family at trial; notices to be given

Sec. 2945.07. (A) IN ANY CASE IN WHICH A PERSON IS CHARGED WITH A VIOLATION OF SECTION 2903.02, 2903.03, 2903.04, 2903.06, 2903.11, 2905.01, 2905.02, 2905.11, 2907.02, 2907.12, 2909.02, 2911.01, 2911.02, 2911.11, OR 2911.12 OF THE REVISED CODE, A VIOLATION OF SECTION 2903.01 OF THE REVISED CODE IN WHICH THE INDICTMENT OR COUNT IN THE INDICTMENT DOES NOT CONTAIN ONE OR MORE SPECIFICATIONS OF AGGRAVATING CIRCUMSTANCES LISTED IN DIVISION (A) OF SECTION 2929.04 OF THE REVISED CODE, OR A FELONY VIOLATION OF SECTION 2903.07 OF THE REVISED CODE, IF THE PERSON IS BROUGHT TO TRIAL ON THE CHARGE THE COURT SHALL DETERMINE WHETHER THE VICTIM OF THE ACT THAT WAS THE BASIS OF THE CHARGE, OR A REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY IF THE VICTIM DIED AS A RESULT OF THAT ACT, IS PRESENT AT THE TRIAL. IF THE PERSON IS TRIED BEFORE A JURY, THE COURT SHALL NOT MAKE THE DETERMINATION IN THE PRESENCE OF THE JURY. IF THE COURT DETERMINES THAT THE VICTIM OR A REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY IS PRESENT AT ANY SESSION OF THE TRIAL, THE COURT SHALL REQUIRE THE VICTIM'S OR REPRESENTATIVE FAMILY MEMBER'S NAME AND THE FACT THAT HE WAS PRESENT AT THE TRIAL TO BE INDICATED IN THE RECORD OF THE CASE AND SHALL PROVIDE THE VICTIM OR THE REPRESENTATIVE FAMILY MEMBER WITH THE WRITTEN NOTICE DESCRIBED IN DIVISION (B) OF THIS SECTION. THIS SECTION DOES NOT AUTHORIZE ANY

VICTIM OR REPRESENTATIVE MEMBER OF A VICTIM'S FAMILY, OR ANY ATTORNEY OR AGENT FOR A VICTIM OR REPRESENTATIVE MEMBER OF A VICTIM'S FAMILY, TO MAKE ANY STATEMENT AT THE TRIAL.

(B)(1) IN ANY CASE IN WHICH A PERSON IS CHARGED WITH ANY VIOLATION DESCRIBED IN DIVISION (A) OF THIS SECTION, IF THE COURT DETERMINES THAT THE VICTIM OF THE ACT THAT WAS THE BASIS OF THE CHARGE, OR A REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY IF THE VICTIM DIED AS A RESULT OF THAT ACT, IS PRESENT AT ANY SESSION OF THE TRIAL ON THE CHARGE, THE COURT SHALL PROVIDE THE VICTIM OR REPRESENTATIVE FAMILY MEMBER WITH WRITTEN NOTICE OF ALL OF THE FOLLOWING:

(a) THE NAME OF THE PERSON CHARGED WITH THE VIOLATION;

(b) THE CASE OR DOCKET NUMBER ASSIGNED TO THE CHARGE;

(c) A TELEPHONE NUMBER OR NUMBERS THAT THE VICTIM OR REPRESENTATIVE FAMILY MAY CALL IN THE FUTURE, DURING NORMAL BUSINESS HOURS, FOR INFORMATION ABOUT THE FINAL RESOLUTION OF THE CHARGE, ABOUT ANY SENTENCE IMPOSED UPON THE DEFENDANT RELATIVE TO THAT CHARGE, AND ABOUT ANY ACTION TAKEN IN RELATION TO ANY SUCH SENTENCE, INCLUDING WHETHER IT HAS BEEN SUSPENDED AND THE DEFENDANT HAS BEEN PLACED ON PROBATION, WHETHER THE DEFENDANT HAS BEEN GRANTED A FURLOUGH, WHETHER THE DEFENDANT HAS BEEN PARDONED OR PAROLED OR HAS HAD HIS SENTENCE COMMUTED, AND WHETHER ANY OTHER ACTION HAS BEEN TAKEN THAT HAS RESULTED OR WILL

RESULT IN THE DEFENDANT'S RELEASE FROM IMPRISONMENT PRIOR TO THE EXPIRATION OF THAT SENTENCE.

(2) A NOTICE REQUIRED BY DIVISION (B)(1) OF THIS SECTION ALSO SHALL INDICATE THAT IF THE PERSON CHARGED WITH THE VIOLATION IS SENTENCED AND HIS SENTENCE REQUIRES THAT HE SERVE A TERM OF IMPRISONMENT IN A STATE PENAL OR REFORMATORY INSTITUTION, THE VICTIM OR THE REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY MAY PROVIDE THE ADULT PAROLE AUTHORITY WITH A MEMORANDUM INCLUDING BOTH AN ADDRESS AND TELEPHONE NUMBER AT WHICH NOTICE CAN BE PROVIDED TO HIM AND THE NAME OF THE OFFENDER, AND THAT IF SUCH A MEMORANDUM IS PROVIDED, THE VICTIM OR REPRESENTATIVE FAMILY MEMBER WILL BE NOTIFIED BY THE ADULT PAROLE AUTHORITY BEFORE THE DEFENDANT IS RECOMMENDED FOR A PARDON OR COMMUTATION OR IS GRANTED A PAROLE, THE VICTIM OR REPRESENTATIVE FAMILY MEMBER, AFTER RECEIPT OF SUCH A NOTIFICATION, MAY SEND A WRITTEN STATEMENT RELATIVE TO THE VICTIMIZATION AND THE PENDING ACTION TO THE ADULT PAROLE AUTHORITY, AND THE ADULT PAROLE AUTHORITY WILL CONSIDER ANY SUCH STATEMENT PRIOR TO RECOMMENDING A PARDON OR COMMUTATION FOR OR GRANTING A PAROLE TO THE DEFENDANT. THE NOTICE REQUIRED BY DIVISION (B)(1) OF THIS SECTION SHALL INCLUDE AN ADDRESS AND TELEPHONE NUMBER FOR THE ADULT PAROLE AUTHORITY.

(3) THE COURT SHALL ENSURE THAT THE NOTICE REQUIRED BY DIVISION (B)(1) OF THIS SECTION IS PROVIDED TO A

PARTICULAR VICTIM OR A REPRESENTATIVE MEMBER OF HIS FAMILY NO LATER THAN THE DATE OF THE SENTENCING OF THE PERSON CHARGED WITH COMMITTING AN OFFENSE AGAINST THAT VICTIM. IF A VICTIM OR REPRESENTATIVE MEMBER OF A DECEASED VICTIM'S FAMILY WHO IS PROVIDED THE NOTICE REQUIRED BY DIVISION (B)(1) OF THIS SECTION CALLS A TELEPHONE NUMBER, DURING NORMAL BUSINESS HOURS, THAT THE NOTICE INDICATES MAY BE CALLED FOR INFORMATION, AND IDENTIFIES HIMSELF, THE PERSON CHARGED WITH THE VIOLATION DESCRIBED IN DIVISION (A) OF THIS SECTION, AND THE CASE OR DOCKET NUMBER ASSIGNED TO THE OFFENSE OR COUNT CHARGED, THE VICTIM OR THE REPRESENTATIVE FAMILY MEMBER SHALL BE INFORMED OF THE FINAL RESOLUTION OF THE CHARGE AND, IF APPLICABLE, ANY SENTENCE IMPOSED UPON THE PERSON CHARGED, AND ANY ACTION TAKEN IN RELATION TO ANY SUCH SENTENCE.

(C) THE FAILURE OF A COURT TO COMPLY WITH THE PROVISIONS OF THIS SECTION DOES NOT GIVE, AND SHALL NOT BE CONSTRUED AS GIVING, ANY RIGHTS OR ANY GROUNDS FOR APPEAL OR POST-CONVICTION RELIEF TO THE DEFENDANT IN THE CASE.

2945.451 Employee's attendance at proceeding in criminal case under subpoena; employer may not penalise

Sec. 2945.451. NO EMPLOYER SHALL DISCHARGE OR TERMINATE FROM EMPLOYMENT, THREATEN TO DISCHARGE OR TERMINATE FROM EMPLOYMENT, OR

OTHERWISE PUNISH OR PENALIZE ANY EMPLOYEE BECAUSE OF TIME LOST FROM REGULAR EMPLOYMENT AS A RESULT OF THE EMPLOYEE'S ATTENDANCE AT ANY PROCEEDING IN A CRIMINAL CASE PURSUANT TO A SUBPOENA. THIS SECTION GENERALLY DOES NOT REQUIRE AND SHALL NOT BE CONSTRUED TO REQUIRE AN EMPLOYER TO PAY AN EMPLOYEE FOR TIME LOST AS A RESULT OF ATTENDANCE AT ANY CRIMINAL PROCEEDING. HOWEVER, IF AN EMPLOYEE IS SUBPOENAED TO APPEAR AT A CRIMINAL PROCEEDING AND THE PROCEEDING PERTAINS TO AN OFFENSE AGAINST THE EMPLOYEE DURING THE COURSE OF HIS EMPLOYMENT, THE EMPLOYER SHALL NOT DECREASE OR WITHHOLD THE EMPLOYEE'S PAY FOR ANY TIME LOST AS A RESULT OF COMPLIANCE WITH THE SUBPOENA. ANY EMPLOYER WHO KNOWINGLY VIOLATES THIS SECTION IS IN CONTEMPT OF COURT.

2949.12 Conveying convicted felon to reception facility

Sec. 2949.12. Unless the execution of sentence is suspended, a convicted felon who is sentenced to serve a term of imprisonment in a state penal institution shall be conveyed within five days after sentencing, excluding Saturdays, Sun- [6] days, and legal holidays, by the sheriff of the county in which the conviction was had to the facility that is designated by the department of rehabilitation and correction for the reception of convicted felons. The sheriff shall deliver the convicted felon into the custody of the managing officer of the reception facility, AND SHALL, AT THAT TIME, PRESENT THE MANAGING OFFICER with a copy of the convicted felon's sentence that ~~shall~~ clearly DESCRIBES the offense, ~~designate~~ DESIGNATES

the sections of the Revised Code under which conviction was had, and pursuant to section 2967.191 of the Revised Code ~~specify~~ SPECIFIES the total number of days, if any the individual was confined, for any reason, prior to conviction and sentence ~~together~~ AND with a copy of the indictment. IF THE RECORD IN THE CONVICTED FELON'S CASE INCLUDES A NOTATION ENTERED PURSUANT TO DIVISION (A) OF SECTION 2943.041 OR DIVISION (A) OF SECTION 2945.07 OF THE REVISED CODE THAT INDICATES THAT A VICTIM OR THE REPRESENTATIVE MEMBER OF A VICTIM'S FAMILY WAS PRESENT AT A PROCEEDING OF A TYPE DESCRIBED IN THAT DIVISION AND THAT IDENTIFIES THE VICTIM OR REPRESENTATIVE MEMBER BY NAME, A COPY OF THE NOTATION ALSO SHALL BE ATTACHED TO THE COPY OF THE SENTENCE. The clerk of the court of common pleas shall furnish the copies of the sentence and indictment, AND OF THE NOTATION OF APPEARANCE BY THE VICTIM OR A REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY. In the case of a person under the age of eighteen years who is certified to the court of common pleas by the juvenile court, a copy of the certification ALSO shall be attached to the copy of the indictment.

The convicted felon shall be assigned to an institution or designated to be housed in a county, multicounty, municipal, or municipal-county jail or workhouse, if authorized pursuant to section 5120.161 of the Revised Code, shall be conveyed to the institution, jail, or workhouse, and shall be kept within such institution, jail, or workhouse until the term of his imprisonment expires, he is pardoned or paroled, or he is transferred under laws permitting the transfer of prisoners. If the execution of his sentence is suspended, and the judgment thereafter affirmed, he shall be conveyed, in the same manner as if the execution of his

sentence had not been suspended, to the reception facility as soon as practicable after the judge directs the execution of sentence. The trial judge or other judge of the court may, in his discretion and for good cause shown, extend the time of such conveyance.

2967.03 Pardon, commutation, or reprieve

Sec. 2967.03. The adult parole authority may exercise its functions and duties in relation to the pardon, commutation, or reprieve of a convict upon direction of the governor or upon its own initiative, and in relation to the parole of a prisoner eligible for parole, upon the initiative of the head of the institution wherein the prisoner is confined, or upon its own initiative. When a prisoner becomes eligible for parole, the head of the institution in which such prisoner is confined shall notify the authority in the manner prescribed by the authority. The authority may investigate and examine, or cause the investigation and examination of, prisoners confined in state penal or reformatory institutions concerning their conduct therein, their mental and moral qualities and characteristics, their knowledge of a trade or profession, their former means of livelihood, their family relationships, and any other matters affecting their fitness to be at liberty without being a threat to society.

The authority may recommend to the governor the pardon, commutation, or reprieve of sentence of any convict or prisoner, or grant a parole to any prisoner if in its judgment there is reasonable ground to believe that, if the convict is granted a pardon, commutation, or reprieve, or if the prisoner is paroled, such action would further the interests of justice and be consistent with the welfare and security of society. HOWEVER, THE AUTHORITY SHALL NOT RECOMMEND A

PARDON OR COMMUTATION OF SENTENCE OF, OR GRANT A PAROLE TO, ANY CONVICT OR PRISONER UNTIL THE AUTHORITY HAS COMPLIED WITH THE APPLICABLE NOTICE REQUIREMENTS OF SECTION 2967.12 OF THE REVISED CODE, AND HAS CONSIDERED ANY STATEMENT MADE BY A VICTIM OR A REPRESENTATIVE MEMBER OF A VICTIM'S FAMILY THAT IS RELEVANT TO THE CONVICT'S OR PRISONER'S CASE AND THAT WAS SENT TO THE AUTHORITY PURSUANT TO DIVISION (C) OF SECTION 2943.041 OF THE REVISED CODE AND ANY OTHER STATEMENT MADE BY A VICTIM OR A REPRESENTATIVE MEMBER OF A VICTIM'S FAMILY THAT IS RELEVANT TO THE CONVICT'S OR PRISONER'S CASE AND THAT WAS RECEIVED BY THE AUTHORITY AFTER IT PROVIDED NOTICE OF THE PENDENCY OF THE ACTION UNDER SECTION 2967.12 OF THE REVISED CODE. The trial judge and prosecuting attorney of the trial court in which a person was convicted shall furnish, at the request of the authority, a summarized statement of the facts proved at the trial, and of all other facts having reference to the propriety of recommending a pardon or commutation, or granting a parole, together with a recommendation for or against a pardon, commutation, or parole, and the reasons for such recommendation. All state and local officials shall furnish information to the authority, when so requested by it in the performance of its duties.

2967.12 Notice of pendency of pardon, commutation, or parole; rights of crime victim or family

Sec. 2967.12. (A) At least three weeks before the adult parole authority recommends any pardon

or commutation of sentence, or grants any parole, notice of the pendency of ~~such matter~~ THE PARDON, COMMUTATION, OR PAROLE, setting forth the name of the person on whose behalf it is made, the crime for which he was convicted, the time of conviction, and the term of sentence, shall be sent to the prosecuting attorney and the judge of the court of common pleas of the county in which the indictment against the convict was found. Where IF there is more than one such judge the notice shall be sent to the presiding judge of ~~said county~~ THE COURT.

(B)(1) EXCEPT AS PROVIDED IN DIVISION (B)(3) OF THIS SECTION, IF THE CONVICT'S SENTENCE AROSE OUT OF A CASE IN WHICH THE RECORD INCLUDES A NOTATION ENTERED PURSUANT TO DIVISION (A) OF SECTION 2943.041 OR DIVISION (A) OF 2945.07 OF THE REVISED CODE THAT INDICATES THAT A VICTIM OR A REPRESENTATIVE MEMBER OF A VICTIM'S FAMILY WAS PRESENT AT A PROCEEDING OF A TYPE DESCRIBED IN THAT DIVISION AND THAT IDENTIFIED THE VICTIM OR REPRESENTATIVE MEMBER BY NAME, THE ADULT PAROLE AUTHORITY ALSO SHALL SEND A NOTICE TO THE VICTIM OR THE REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY PRIOR TO RECOMMENDING ANY PARDON OR COMMUTATION OF SENTENCE FOR, OR GRANTING ANY PAROLE TO, THE PERSON. THE NOTICE SHALL BE PROVIDED AT THE SAME TIME AS THE NOTICE REQUIRED BY DIVISION (A) OF THIS SECTION AND SHALL CONTAIN THE INFORMATION REQUIRED TO BE SET FORTH IN THAT NOTICE. THE NOTICE ALSO SHALL INFORM THE VICTIM OR THE REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY THAT HE MAY SEND A WRITTEN STATEMENT RELATIVE TO THE VICTIMIZATION AND THE PENDING ACTION

TO THE ADULT PAROLE AUTHORITY, AND THAT ANY SUCH STATEMENT RECEIVED BY THE ADULT PAROLE AUTHORITY PRIOR TO RECOMMENDING A PARDON OR COMMUTATION OR GRANTING A PAROLE WILL BE CONSIDERED BY THE AUTHORITY BEFORE A PARDON OR COMMUTATION IS RECOMMENDED OR A PAROLE IS GRANTED. THE NOTICE DESCRIBED IN THIS DIVISION SHALL BE PROVIDED IN ACCORDANCE WITH DIVISION (B)(3) OF THIS SECTION.

(2) FOR PURPOSES OF PROVIDING THE NOTICE DESCRIBED IN DIVISION (B)(1) OF THIS SECTION, THE VICTIM OR THE REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY MAY FILE A WRITTEN STATEMENT WITH THE ADULT PAROLE AUTHORITY, PRIOR TO THE DAY ON WHICH THE NOTICE IS SENT, THAT DESIGNATES ANOTHER PERSON AS THE AGENT OF THE VICTIM OR THE FAMILY, IDENTIFIES THE AGENT AND THE ORGANIZATION, IF ANY, THAT HE REPRESENTS, AND PROVIDES AN ADDRESS FOR THE AGENT TO WHICH THE NOTICE CAN BE SENT, A TELEPHONE NUMBER AT WHICH THE AGENT CAN BE CONTACTED, AND THE DAYS OF THE WEEK AND GENERAL TIMES OF DAY AT WHICH THE AGENT CAN BE CONTACTED AT THAT NUMBER, AND THAT IS SIGNED BY THE VICTIM OR REPRESENTATIVE MEMBER OF THE FAMILY. THE AGENT MAY BE, BUT IS NOT REQUIRED TO BE, AN ATTORNEY. UPON THE FILING OF THE STATEMENT, THE REQUIRED [7] NOTICE SHALL BE PROVIDED TO THE AGENT INSTEAD OF THE VICTIM OR THE FAMILY, IN ACCORDANCE WITH DIVISION (B)(3) OF THIS SECTION.

(3) THE NOTICE DESCRIBED IN DIVISION (B)(1) OF THIS SECTION DOES NOT HAVE TO BE PROVIDED UNLESS THE ADULT PAROLE AUTHORITY, PRIOR TO ITS

RECOMMENDING A PARDON OR COMMUTATION OF SENTENCE FOR, OR GRANTING A PAROLE TO, THE OFFENDER, IS PROVIDED A WRITTEN MEMORANDUM THAT INCLUDES THE ADDRESS AT WHICH THE NOTICE CAN BE SENT TO THE VICTIM, REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY, OR AGENT, A HOME TELEPHONE NUMBER, AND IF APPLICABLE, A BUSINESS TELEPHONE NUMBER AT WHICH THE VICTIM OR THE REPRESENTATIVE MEMBER OF THE FAMILY CAN BE CONTACTED, OR IF AN AGENT WAS DESIGNATED, A TELEPHONE NUMBER AT WHICH THE AGENT CAN BE CONTACTED, AND THE DAYS OF THE WEEK AND GENERAL TIMES OF DAY AT WHICH THE VICTIM, REPRESENTATIVE MEMBER OF THE FAMILY, OR AGENT CAN BE CONTACTED AT EACH TELEPHONE NUMBER PROVIDED. A STATEMENT FILED UNDER DIVISION (B)(2) OF THIS SECTION THAT DESIGNATES AN AGENT SUFFICES AS A MEMORANDUM FOR PURPOSES OF THIS DIVISION. IF THE ADULT PAROLE AUTHORITY IS PROVIDED A MEMORANDUM IN ACCORDANCE WITH THIS DIVISION, THEN THE ADULT PAROLE AUTHORITY SHALL PROVIDE THE NOTICE DESCRIBED IN DIVISION (B)(1) OF THIS SECTION TO THE VICTIM, THE REPRESENTATIVE MEMBER OF THE FAMILY, OR THE AGENT, EITHER BY SENDING IT REGULAR MAIL TO THE ADDRESS PROVIDED OR BY COMMUNICATING IT ORALLY, BY TELEPHONE, AT THE NUMBER PROVIDED. HOWEVER, IF THE ADULT PAROLE AUTHORITY ATTEMPTS TO ORALLY COMMUNICATE THE NOTICE, BY TELEPHONE, TO THE VICTIM, THE REPRESENTATIVE OF THE FAMILY, OR THE DESIGNATED AGENT AT EACH TELEPHONE NUMBER PROVIDED, BUT IS UNABLE TO DO

SO AFTER AT LEAST THREE GOOD FAITH ATTEMPTS TO DO SO, THE ADULT PAROLE AUTHORITY DOES NOT HAVE TO MAKE ANY FURTHER ATTEMPTS TO ORALLY COMMUNICATE THE NOTICE AND DOES NOT HAVE TO SEND IT BY REGULAR MAIL OR PROVIDE IT IN ANY OTHER MANNER. IF THE NOTICE IS COMMUNICATED ORALLY, BY TELEPHONE, THE ADULT PAROLE AUTHORITY SHALL RECORD THE TELEPHONE NUMBER CALLED, THE DATE AND TIME OF DAY OF THE COMMUNICATION, THE NAME OF THE PERSON TO WHOM THE NOTICE IS GIVEN, AND THE CONTENT OF THE COMMUNICATION. A MEMORANDUM FILED UNDER THIS DIVISION MAY BE MODIFIED BY THE FILING OF A SUBSEQUENT MEMORANDUM.

(C) When notice of the pendency of any such matter PARDON, COMMUTATION, OR PAROLE has been given as provided in DIVISION (A) OF this section, and hearing on the matter PARDON, COMMUTATION, OR PAROLE is continued to a date certain, notice of the further consideration of such matter PARDON, COMMUTATION, OR PAROLE shall be given by mail to the proper judge and prosecuting attorney at least ten days before such THE further consideration. WHEN NOTICE OF THE PENDENCY OF ANY PARDON, COMMUTATION, OR PAROLE HAS BEEN GIVEN AS PROVIDED IN DIVISION (B) OF THIS SECTION, AND HEARING ON IT IS CONTINUED TO A DATE CERTAIN, NOTICE OF THE FURTHER CONSIDERATION SHALL BE GIVEN TO THE VICTIM OR THE VICTIM'S FAMILY IN ACCORDANCE WITH, AND SUBJECT TO THE EXCEPTION CONTAINED IN DIVISION (B)(3) OF THIS SECTION.

(D) In case of an application for the pardon or commutation of sentence of a person sentenced to capital punishment, the governor may modify the

requirements of such notification and publication if there is not sufficient time for compliance therewith before the date fixed for the execution of sentence.

(E) THE FAILURE OF THE ADULT PAROLE AUTHORITY TO COMPLY WITH THE NOTICE PROVISIONS OF DIVISION (A), (B), OR (C) OF THIS SECTION DOES NOT GIVE, AND SHALL NOT BE CONSTRUED AS GIVING, ANY RIGHTS OR ANY GROUNDS FOR APPEAL OR POST-CONVICTION RELIEF TO THE PERSON SERVING THE SENTENCE.

2969.01 Definitions

Sec. 2969.01. AS USED IN SECTIONS 2969.01 TO 2969.06 OF THE REVISED CODE:

(A) "OFFENDER" MEANS A PERSON WHO PLEADS GUILTY TO, IS CONVICTED OF, OR IS FOUND NOT GUILTY BY REASON OF INSANITY OF, AN OFFENSE IN THIS STATE, OR AGAINST WHOM A COMPLAINT OR INFORMATION HAS BEEN FILED OR AND INDICTMENT HAS BEEN RETURNED IN THIS STATE.

(B) "VICTIM" MEANS A PERSON WHO SUFFERS PERSONAL INJURY, DEATH, OR PROPERTY LOSS AS A RESULT OF ANY OF THE FOLLOWING, OR THE BENEFICIARIES OF ANY ACTION FOR THE WRONGFUL DEATH OF ANY PERSON KILLED AS A RESULT OF ANY OF THE FOLLOWING:

(1) ANY OFFENSE;

(2) THE GOOD FAITH EFFORT OF ANY PERSON TO PREVENT AN OFFENSE;

(3) THE GOOD FAITH EFFORT OF ANY PERSON TO APPREHEND A PERSON SUSPECTED OF ENGAGING IN AN OFFENSE.

2969.02 Offender's contract to publish material related to his offense; money due to be paid to clerks of court of claims; liability

Sec. 2969.02. (A) EXCEPT AS PROVIDED IN SECTION 2969.05 OF THE REVISED CODE, ANY PERSON THAT ENTERS INTO A CONTRACT WITH AN OFFENDER, OR WITH AN AGENT, ASSIGNEE, CONSPIRATOR, OR ACCOMPLICE OF THE OFFENDER, SHALL PAY ANY MONEY, AND THE MONETARY VALUE OF ANY PROPERTY OTHER THAN MONEY, DUE UNDER THE CONTRACT TO THE CLERK OF THE COURT OF CLAIMS FOR DEPOSIT WITH THE TREASURER OF STATE, IF THE TERMS OF THE CONTRACT PROVIDE FOR ANY OF THE FOLLOWING:

(1) THE REENACTMENT OR DESCRIPTION BY THE OFFENDER IN ANY OF THE FOLLOWING, OF ANY OFFENSE THAT THE OFFENDER COMMITTED:

(a) A MOVIE, BOOK, MAGAZINE, NEWSPAPER, ARTICLE, OR OTHER FORM OF LITERARY EXPRESSION;

(b) A PROGRAM ON TELEVISION, RADIO, OR ANY OTHER BROADCASTING MEDIUM;

(c) A PLAY, SPEECH, OR ANY OTHER FORM OF LIVE ENTERTAINMENT, INSTRUCTION OR PRESENTATION.

(2) THE EXPRESSION OR DESCRIPTION OF THE OFFENDER'S THOUGHTS, FEELINGS, OPINIONS, OR EMOTIONS REGARDING OR EXPERIENCED DURING THE OFFENSE IN ANY MATERIAL, PERFORMANCE, OR PROGRAM DESCRIBED IN DIVISION (A)(1)(a), (1)(b), OR (1)(c) OF THIS SECTION.

(3) THE LIFE STORY OR ANY PART OF THE LIFE STORY OF THE OFFENDER OR AN INTERVIEW OR ANY PART OF AN INTERVIEW WITH THE OFFENDER OR AN AGENT, CONSPIRATOR, OR ACCOMPLICE OF

THE OFFENDER THAT IS TO BE USED IN ANY MATERIAL, PERFORMANCE, OR PROGRAM DESCRIBED IN DIVISION (A)(1)(a), (1)(b), OR (1)(c) OF THIS SECTION, IF THE PUBLICATION VALUE OF THE STORY OR INTERVIEW RESULTS IN PART FROM THE NOTORIETY BROUGHT BY THE COMMISSION OF AN OFFENSE.

(B) ANY OFFENDER, OR AN AGENT, ASSIGNEE, CONSPIRATOR, OR ACCOMPLICE OF THE OFFENDER, WHO ENTERS INTO ANY CONTRACT DESCRIBED IN DIVISION (A) OF THIS SECTION OR ANY PERSON WHO RECEIVES MONEY, OR RECEIVES ANY PROPERTY OTHER THAN MONEY, PURSUANT TO SUCH A CONTRACT SHALL PAY THE MONEY, OR THE MONETARY VALUE OF THE OTHER PROPERTY, RECEIVED PURSUANT TO THE CONTRACT TO THE CLERK OF THE COURT OF CLAIMS FOR DEPOSIT WITH THE TREASURER OF STATE. IF ANY PERSON RECEIVES ANY MONEY OR OTHER PROPERTY PURSUANT TO A CONTRACT DESCRIBED IN DIVISION (A) OF THIS SECTION AND FAILS TO PAY IT OR ITS MONETARY VALUE TO THE CLERK OF THE COURT OF CLAIMS FOR DEPOSIT WITH THE TREASURER OF STATE AS REQUIRED BY THIS SECTION, THE STATE HAS A LIEN UPON THE MONEY OR PROPERTY AND UPON ANY PROPERTY THAT IS PURCHASED OR OTHERWISE OBTAINED WITH THE MONEY OR PROPERTY. THE ATTORNEY GENERAL SHALL ENFORCE THE LIEN IN THE SAME MANNER AS A JUDGMENT LIEN MAY BE ENFORCED BY A PRIVATE INDIVIDUAL.

(C)(1) ANY PERSON THAT FAILS TO PAY ANY [8] MONEY, OR THE MONETARY VALUE OF ANY PROPERTY OTHER THAN MONEY, TO THE CLERK OF THE COURT OF CLAIMS FOR DEPOSIT WITH THE

TREASURER OF STATE AS REQUIRED BY THIS SECTION IS LIABLE TO THE STATE FOR THE MONEY OR THE MONETARY VALUE OF THE PROPERTY.

(2) IF ANY PERSON WHO IS REQUIRED BY THIS SECTION TO PAY MONEY, OR THE MONETARY VALUE OF ANY PROPERTY OTHER THAN MONEY, TO THE CLERK OF THE COURT OF CLAIMS FOR DEPOSIT WITH THE TREASURER OF THE STATE FAILS TO DO SO, THE ATTORNEY GENERAL SHALL BRING AN ACTION TO RECOVER THE MONEY OR THE MONETARY VALUE OF THE PROPERTY AGAINST THE PERSON WHO HAS POSSESSION, CUSTODY, OR CONTROL OF THE MONEY OR PROPERTY OR AGAINST THE PERSON WHO FAILED TO PAY THE MONEY, OR THE MONETARY VALUE OF THE PROPERTY, TO THE CLERK OF THE COURT OF CLAIMS FOR DEPOSIT WITH THE TREASURER OF THE STATE AS REQUIRED. THE ACTION SHALL BE BROUGHT IN THE APPROPRIATE COURT. IF THE COURT DETERMINES IN AN ACTION BROUGHT PURSUANT TO THIS DIVISION THAT MONEY, OR THE MONETARY VALUE OF ANY PROPERTY, IS TO BE PAID TO THE CLERK OF THE COURT OF CLAIMS FOR DEPOSIT WITH THE TREASURER OF STATE, IT SHALL ORDER THAT THE MONEY BE PAID TO THE CLERK OF THE COURT OF CLAIMS FOR DEPOSIT WITH THE TREASURER OF STATE AND THAT THE PROPERTY BE SOLD AND THE MONEY RECEIVED FROM THE SALE BE PAID TO THE CLERK OF THE COURT OF CLAIMS FOR DEPOSIT WITH THE TREASURER OF STATE.

2969.03 Any person may bring declaratory judgment action concerning such a contract

Sec. 2969.03. ANY PERSON MAY BRING AN ACTION FOR A DECLARATORY JUDGMENT TO DETERMINE IF SECTION 2969.02 OF THE REVISED CODE APPLIES TO A PARTICULAR CONTRACT. THE ACTION FOR DECLARATORY JUDGMENT SHALL BE BROUGHT IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS.

2969.04 Clerk of court of claims to administer funds; separate accounts procedures

Sec. 2969.04. (A) THE CLERK OF THE COURT OF CLAIMS SHALL ADMINISTER THE RECOVERY OF OFFENDER'S PROFITS SPECIAL ACCOUNT ESTABLISHED BY SECTION 2969.06 OF THE REVISED CODE, AND SHALL MAINTAIN IN THE NAME OF EACH OFFENDER A SEPARATE FUND FOR ANY MONEY, OR MONEY RECEIVED FROM THE SALE OR OTHER DISPOSITION OF ANY PROPERTY, RECEIVED PURSUANT TO SECTION 2969.02 OR 2969.03 OF THE REVISED CODE. THE MONEY SHALL BE DISTRIBUTED IN ACCORDANCE WITH DIVISION (C) OF THIS SECTION.

IF MONEY IS DEPOSITED IN THE RECOVERY OF OFFENDER'S PROFITS SPECIAL ACCOUNT AND MAINTAINED IN A SEPARATE FUND IN THE NAME OF THE OFFENDER AND IF THE OFFENDER IS FOUND NOT GUILTY OF ALL OF THE CHARGES AGAINST HIM IN THIS STATE, OR ALL OF THE CHARGES AGAINST HIM IN THIS STATE ARE DISMISSED, OR HE IS FOUND NOT GUILTY OF SOME OF THE CHARGES AGAINST HIM IN THIS STATE AND THE REMAINING CHARGES AGAINST HIM IN THIS STATE ARE DISMISSED, THE CLERK OF THE COURT OF CLAIMS SHALL DIRECT THE

TREASURER OF STATE TO RETURN ALL OF THE MONEY IN THE SEPARATE FUND PLUS ANY INTEREST EARNED ON THE MONEY TO THE PERSONS FROM WHOM IT WAS OBTAINED.

(B) NOTWITHSTANDING ANY CONTRARY PROVISION OF ANY SECTION OF THE REVISED CODE THAT DEALS WITH THE LIMITATION OF ACTIONS, A VICTIM OF ANY OFFENSE COMMITTED BY AN OFFENDER IN WHOSE NAME A SEPARATE FUND IS MAINTAINED IN THE RECOVERY OF OFFENDER'S PROFITS SPECIAL ACCOUNT MAY BRING A CIVIL ACTION AGAINST THE OFFENDER OR HIS REPRESENTATIVES AT ANY TIME WITHIN THREE YEARS AFTER THE ESTABLISHMENT OF THE SEPARATE FUND.

IN ORDER TO RECOVER FROM A SEPARATE FUND MAINTAINED IN THE RECOVERY OF OFFENDER'S PROFITS SPECIAL ACCOUNT IN THE NAME OF AN OFFENDER, A VICTIM OF THAT OFFENDER SHALL:

(1) WITHIN THE THREE-YEAR PERIOD OR, IF THE ACTION WAS INITIATED BEFORE THE FUND WAS ESTABLISHED, WITHIN NINETY DAYS AFTER THE FUND IS ESTABLISHED, NOTIFY THE CLERK OF THE COURT OF CLAIMS THAT A CIVIL ACTION HAS BEEN BROUGHT AGAINST THE OFFENDER;

(2) NOTIFY THE CLERK OF THE COURT OF CLAIMS OF THE ENTRY OF ANY JUDGMENT IN THE CIVIL ACTION;

(3) WITHIN NINETY DAYS AFTER THE JUDGMENT IN THE CIVIL ACTION IS FINAL OR, IF THE JUDGMENT WAS OBTAINED BEFORE THE FUND WAS ESTABLISHED, WITHIN NINETY DAYS AFTER THE FUND IS ESTABLISHED, REQUEST THE CLERK OF THE COURT OF CLAIMS TO PAY FROM THE

SEPARATE FUND MAINTAINED IN THE NAME OF THE OFFENDER, ANY JUDGMENT HE IS AWARDED IN THE CIVIL ACTION.

IF A CIVIL ACTION IS FILED AGAINST AN OFFENDER OR HIS REPRESENTATIVES AND THE CIVIL ACTION IS FILED AFTER THE EXPIRATION OF THE STATUTE OF LIMITATIONS THAT WOULD APPLY TO THE CIVIL ACTION, BUT FOR THIS DIVISION, THE COURT SHALL STATE IN ITS JUDGMENT THAT THE JUDGMENT MAY BE ENFORCED ONLY AGAINST THE SEPARATE FUND MAINTAINED IN THE NAME OF THAT OFFENDER IN THE RECOVERY OF OFFENDER'S PROFITS SPECIAL ACCOUNT.

(C) THE CLERK OF THE COURT OF CLAIMS SHALL DIRECT THE TREASURER OF STATE TO MAKE PAYMENTS FROM THE SEPARATE FUND MAINTAINED IN THE NAME OF AN OFFENDER IN THE RECOVERY OF OFFENDER'S PROFITS SPECIAL ACCOUNT TO ANY VICTIM OF THE OFFENDER WHO HAS OBTAINED A JUDGMENT AGAINST THE OFFENDER FOR DAMAGES RESULTING FROM AN OFFENSE COMMITTED BY THE OFFENDER. THE PAYMENTS SHALL BE MADE AS PROVIDED IN THIS DIVISION.

AFTER AN OFFENDER, IN WHOSE NAME A SEPARATE FUND IS MAINTAINED IN THE RECOVERY OF OFFENDER'S PROFITS SPECIAL ACCOUNT, IS CONVICTED, OR FOUND NOT GUILTY BY REASON OF INSANITY, OF ANY OFFENSE IN THIS STATE, THE CLERK OF THE COURT OF CLAIMS SHALL, ON THE SECOND DAY OF JANUARY AND THE FIRST DAY OF APRIL, JULY, AND OCTOBER OF EACH YEAR, DETERMINE THE AMOUNT OF MONEY IN THE SEPARATE FUND MAINTAINED IN THE NAME OF THAT OFFENDER, AND REQUEST THE AUDITOR OF STATE TO DRAW A WARRANT FOR PAYMENT OF ANY JUDGMENT FOR WHICH

A VICTIM OF THAT OFFENDER HAS, PRIOR TO ANY OF THOSE DATES, REQUESTED PURSUANT TO DIVISION (B) OF THIS SECTION THE CLERK OF THE COURT OF CLAIMS TO PAY A JUDGMENT AGAINST THE OFFENDER. IF THERE ARE INSUFFICIENT FUNDS IN THE SEPARATE FUND MAINTAINED IN THE NAME OF AN OFFENDER TO PAY ALL OF THE JUDGMENTS AGAINST THE OFFENDER, THE CLERK OF THE COURT OF CLAIMS SHALL PAY THE JUDGMENTS ON A PRO RATA BASIS.

2969.05 Distribution of funds

Sec. 2969.05. IF A SEPARATE FUND HAS BEEN MAINTAINED IN THE RECOVERY OF OFFENDER'S PROFITS SPECIAL ACCOUNT, THERE IS NO FURTHER REQUIREMENT TO PAY ANY MONEY, OR THE MONETARY VALUE OF ANY PROPERTY, PURSUANT TO SECTION 2969.02 OF THE REVISED CODE, AND UNLESS OTHERWISE ORDERED BY A COURT OF RECORD IN WHICH A JUDGMENT HAS BEEN RENDERED AGAINST THE OFFENDER, THE CLERK OF THE COURT OF CLAIMS SHALL DIRECT THE TREASURER OF STATE TO PAY THE AMOUNT REMAINING IN THE SEPARATE FUND TO THE PERSONS FROM WHOM THE MONEYS IN THE FUND WERE OBTAINED, IF ALL OF THE FOLLOWING APPLY:

(A) THREE YEARS HAVE ELAPSED SINCE THE ESTABLISHMENT OF THE SEPARATE FUND;

(B) NONE OF THE CIVIL ACTIONS AGAINST THE [8] OFFENDER OR HIS REPRESENTATIVES OF WHICH THE CLERK OF THE COURT OF CLAIMS HAS BEEN NOTIFIED PURSUANT TO DIVISION (B) OF

SECTION 2969.04 OF THE REVISED CODE IS PENDING;

(C) ALL JUDGMENTS AGAINST THE OFFENDER OR HIS REPRESENTATIVES FOR WHICH PAYMENT WAS REQUESTED PURSUANT TO DIVISION (B) OF SECTION 2969.04 OF THE REVISED CODE HAVE BEEN PAID.

2969.06 Recovery of offender's profits special account

Sec. 2969.06. THERE IS HEREBY ESTABLISHED A RECOVERY OF OFFENDER'S PROFITS SPECIAL ACCOUNT IN THE STATE SPECIAL REVENUE FUND THAT SHALL BE MAINTAINED AS SET FORTH IN SECTION 2969.04 OF THE REVISED CODE. ALL MONIES COLLECTED PURSUANT TO SECTIONS 2969.02 AND 2969.03 OF THE REVISED CODE SHALL BE DEPOSITED BY THE TREASURER OF STATE IN THE RECOVERY OF OFFENDER'S PROFITS SPECIAL ACCOUNT. EXCEPT AS PROVIDED IN DIVISION (A) OF SECTION 2969.04 OF THE REVISED CODE, ANY INTEREST EARNED ON THE MONEY IN THE RECOVERY OF OFFENDER'S PROFITS SPECIAL ACCOUNT SHALL BE PAID TO THE TREASURER OF STATE TO BE USED FOR THE COST OF ADMINISTERING SECTIONS 2969.01 TO 2969.06 OF THE REVISED CODE.

SECTION 2. That existing sections 2743.191, 2743.51, 2921.03, 2949.12, 2967.03 and 2967.12 of the Revised Code are hereby repealed.

SECTION 3. That sections 2949.12, 2967.03 and 2967.12 of the Revised Code, as amended by Section 1 of this act, be amended to read as follows, effective July 1, 1987:

2949.12 Conveying convicted felon to reception facility

Sec. 2949.12. Unless the execution of sentence is suspended, a convicted felon who is sentenced to serve a term of imprisonment in a state penal institution shall be conveyed, within five days after sentencing, excluding Saturdays, Sundays, and legal holidays, by the sheriff of the county in which the conviction was had to the facility that is designated by the department of rehabilitation and correction for the reception of convicted felons. The sheriff shall deliver the convicted felon into the custody of the managing officer of the reception facility, and shall, at that time, present the managing officer with a copy of the convicted felon's sentence that clearly describes the offense, designates the sections of the Revised Code under which conviction was had, and pursuant to section 2967.191 of the Revised Code specifies the total number of days, if any, the individual was confined, for any reason, prior to conviction and sentence, with a copy of the indictment. ~~If the record in the convicted felon's case includes a notation entered pursuant to division (A) of section 2943.041 or division (A) of section 2945.07 of the Revised Code that indicates that a victim or a representative member of a victim's family was present at a proceeding of a type described in that division and that identifies the victim or the representative member by name, a copy of the notation also shall be attached to the copy of the sentence.~~ The clerk of the court of common pleas shall furnish the copies of the sentence and indictment, and of the notation of appearance by the victim or a representative member of the victim's family. In the case of a person under the age of eighteen years who is certified to the court of common pleas by the juvenile court, a copy of the certification ALSO shall be attached to the copy of the indictment.

The convicted felon shall be assigned to an institution or designated to be housed in a county, multicounty, municipal, or municipal-county jail or workhouse, if authorized pursuant to section 5120.161 of the Revised Code, shall be conveyed to the institution, jail, or workhouse, and shall be kept within such institution, jail, or workhouse until the term of his imprisonment expires, he is pardoned or paroled, or he is transferred under laws permitting the transfer of prisoners. If the execution of his sentence is suspended, and the judgment thereafter affirmed, he shall be conveyed, in the same manner as if the execution of his sentence had not been suspended, to the reception facility as soon as practicable after the judge directs the execution of sentence. The trial judge or other judge of the court may, in his discretion and for good cause shown, extend the time for such conveyance.

2967.03 Pardon, commutation, or reprieve

Sec. 2967.03. The adult parole authority may exercise its functions and duties in relation to the pardon, commutation, or reprieve of a convict upon direction of the governor or upon its own initiative, and in relation to the parole of a prisoner eligible for parole, upon the initiative of the head of the institution wherein the prisoner is confined, or upon its own initiative. When a prisoner becomes eligible for parole, the head of the institution in which such prisoner is confined shall notify the authority in the manner prescribed by the authority. The authority may investigate and examine, or cause the investigation and examination of, prisoners confined in state penal or reformatory institutions concerning their conduct therein, their mental and moral qualities and characteristics, their knowledge of a trade or profession, their former means of livelihood, their family relationships, and any other matters affecting their fitness to be at liberty without being a threat to society.

The authority may recommend to the governor the pardon, commutation, or reprieve of sentence of any convict or prisoner, or grant a parole to any prisoner if in its judgment there is reasonable ground to believe that, if the convict is granted a pardon, commutation, or reprieve, or if the prisoner is paroled, such action would further the interests of justice and be consistent with the welfare and security of society. ~~However, the authority shall not recommend a pardon or commutation of sentence of, or grant a parole to, any convict or prisoner until the authority has complied with the applicable notice requirements of section 2967.12 of the Revised Code, and has considered any statement made by a victim or a representative member of a victim's family that is relevant to the convict's or prisoner's case and that was sent to the authority pursuant to division (C) of section 2943.041 of the Revised Code and any other statement made by a victim or a representative member of a victim's family that is relevant to the convict's or prisoner's case and that was received by the authority after it provided notice of the pendency of the action under section 2967.12 of the Revised Code~~. The trial judge and prosecuting attorney of the trial court in which a person was convicted shall furnish, at the request of the authority, a summarized statement of the facts proved at the trial, and of all other facts having reference to the propriety of recommending a pardon or commutation, or granting a parole, together with a recommendation for or against a pardon, commutation, or parole, and the reasons for such recommendation. All state and local officials shall furnish information to the authority, when so requested by it in the performance of its duties.

2967.12 Notice of pendency of pardon, commutation, or parole; rights of crime victim or family

Sec. 2967.12. (A) At least three weeks before the adult parole authority recommends any pardon or commutation of sentence, or grants any parole, notice of the pendency of the pardon, commutation, or parole, setting forth the name of the person on whose behalf it is made, the crime for which he was convicted, the time of conviction, and the term of sentence, shall be sent to the prosecuting attorney and the judge of the court of common pleas of the county in which the indictment against the convict was found. If there is more than one such judge the notice shall be sent to the presiding judge of the court.

~~(B)(1) Except as provided in division (B)(3) of this section, if the convict's sentence arose out of a case in which the record includes a notation entered pursuant to division (A) of section 2943.041 or division (A) of 2945.07 of the Revised Code that indicates that a victim or a representative member of a victim's family was present at a proceeding of a type described in that division and that identifies the victim or representative member by name, the adult parole authority also shall send a notice to the victim or the representative member of the victim's family prior to recommending any pardon or commutation of sentence for, or granting any parole to, the person. The notice shall be provided at the same time as the notice required by division (A) of this section and shall contain the information required to be set forth in that notice. The notice also shall inform the victim or the representative member of the victim's family that he may send a written statement relative to the victimization and the pending action to the adult parole authority, and that any such statement received by the adult parole [10] authority prior to recommending a pardon or commutation or granting a parole will be considered by the authority before~~

a pardon or commutation is recommended or a parole is granted. The notice described in this division shall be provided in accordance with division (B)(3) of this section.

(2) For purposes of providing the notice described in division (B)(1) of this section, the victim or the representative member of the victim's family may file a written statement with the adult parole authority, prior to the day on which the notice is sent, that designates another person as the agent of the victim or the family, identifies the agent and the organization, if any, that he represents, and provides an address for the agent to which the notice can be sent, a telephone number at which the agent can be contacted, and the days of the week and general times of day at which the agent can be contacted at that number, and that is signed by the victim or a representative member of the family. The agent may be, but is not required to be, an attorney. Upon the filing of the statement, the required notice shall be provided to the agent instead of to the victim or the family, in accordance with division (B)(3) of this section.

(3) The notice described in division (B)(1) of this section does not have to be provided unless the adult parole authority, prior to its recommending a pardon or commutation of sentence for, or granting a parole to, the offender, is provided a written memorandum that includes the address at which the notice can be sent to the victim, representative member of the victim's family, or agent, a home telephone number, and if applicable, a business telephone number at which the victim or the representative member of the family can be contacted, or if an agent was designated, a telephone number at which the agent can be contacted, and the days of the week and general times of day at which the victim, representative member of the family, or agent can be contacted at each telephone number provided. A statement filed under division (B)(2) of this section that designates an agent suffices as a memorandum for

purposes of this division. If the adult parole authority is provided a memorandum in accordance with this division, then the adult parole authority shall provide the notice described in division (B)(1) of this section to the victim, the representative member of the family, or the agent, either by sending it by regular mail to the address provided or by communicating it orally, by telephone, at the number provided. However, if the adult parole authority attempts to orally communicate the notice, by telephone, to the victim, the representative of the family, or the designated agent at each telephone number provided, but is unable to do so after at least three good faith attempts to do so, the adult parole authority does not have to make any further attempts to orally communicate the notice and does not have to send it by regular mail or provide it in any other manner. If the notice is communicated orally, by telephone, the adult parole authority shall record the telephone number called, the date and time of day of the communication, the name of the person to whom the notice is given, and the content of the communication. A memorandum filed under this division may be modified by the filing of a subsequent memorandum.

(C) When notice of the pendency of any pardon, commutation, or parole has been given as provided in division (A) of this section, and hearing on the pardon, commutation, or parole is continued to a date certain, notice of the further consideration of the pardon, commutation, or parole shall be given by mail to the proper judge and prosecuting attorney at least ten days before the further consideration. When notice of the pendency of any pardon, commutation, or parole has been given as provided in division (B) of this section, and hearing on it is continued to a date certain, notice of the further consideration shall be given to the victim or the victim's family in accordance with, and subject to the exception contained in division (B)(3) of this section.

~~(D)~~ In case of an application for the pardon or commutation of sentence of a person sentenced to capital punishment, the governor may modify the requirements of such notification and publication if there is not sufficient time for compliance therewith before the date fixed for the execution of sentence.

~~(E)~~ The failure of the adult parole authority to comply with the notice provisions of division ~~(A), (B), OR (C)~~ of this section does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to the person serving the sentence.

SECTION 4. That existing sections 2949.12, 2967.03 and 2967.12 and sections 2943.041 and 2945.07 of the Revised Code, as amended or enacted by Section 1 of this act, are hereby repealed, effective July 1, 1987.

APPENDIX C

As Introduced

115th General Assembly
Regular Session S.B. No. 76
1983-1984

Mssrs. Carney-Pfeiffer-Speck-Bowen-Fries

A BILL

To enact section 2937.081 of the Revised Code to require a prosecutor to notify the victim of an alleged offense that is a felony or a misdemeanor of the first degree other than a traffic offense of the upcoming trial or resolution of the case pertaining to the offense, and of the final disposition of the offense and all related offenses.

BE IT ENACTED BY THEGENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 2937.081 of the Revised Code be enacted to read as follows:

Sec. 2937.081. (A) AS USED IN THIS SECTION "VICTIM" MEANS A PERSON, AS DEFINED IN SECTION 1.59 OF THE REVISED CODE, AND A GOVERNMENTAL ENTITY OR INSTRUMENTALITY, THAT HAS SUFFERED INJURY, DAMAGE, OR DEATH AS A RESULT OF THE COMMISSION OF AN OFFENSE BY ANOTHER PERSON.

(B) A PROSECUTOR WHO IS ASSIGNED A CRIMINAL CASE FOR PROSECUTION SHALL DO ALL OF THE FOLLOWING FOR EACH OFFENSE OR COUNT THAT CHARGES A FELONY OR A MISDEMEANOR OF THE FIRST DEGREE, OTHER THAN AN OFFENSE OR

COUNT CONTAINED IN TITLE XLV OF THE REVISED CODE, THAT IS AT ISSUE IN THE CASE:

(1) NOTIFY THE VICTIM OF EACH SUCH OFFENSE OR COUNT, EITHER ORALLY OR IN WRITING, OF THE DATE, TIME, AND PLACE OF THE TRIAL PERTAINING TO THE PARTICULAR OFFENSE OR COUNT, OR IF THE PARTICULAR OFFENSE OR COUNT CHARGED IS RESOLVED WITHOUT TRIAL, THE DATE, TIME, AND PLACE AT WHICH THE PROSECUTOR WILL ENTER A NOLLE PROSEOUI PERTAINING TO THE OFFENSE OR COUNT, AT WHICH A PLEA OF GUILTY OR NO CONTEST PERTAINING TO THE OFFENSE OR COUNT [page 2] WILL BE ENTERED, OR AT WHICH FINAL DISPOSITION OF THE OFFENSE OR COUNT OTHERWISE WILL BE MADE;

(2) NOTIFY THE VICTIM OF EACH SUCH OFFENSE OR COUNT, IN WRITING, OF THE FOLLOWING:

(a) IF THE DEFENDANT WAS CONVICTED OF, PLEADED GUILTY TO, OR PLEADED NO CONTEST TO AND WAS CONVICTED OF, THE PARTICULAR OFFENSE OR COUNT, THE SENTENCE IMPOSED UPON THE DEFENDANT, WHETHER THE SENTENCE WAS SUSPENDED AND THE DEFENDANT WAS PLACED ON PROBATION AND, IF SO, THE CONDITIONS OF THE PROBATION, AND THE PLACE AT WHICH THE DEFENDANT IS TO SERVE ANY TERM OF IMPRISONMENT IMPOSED, IF APPLICABLE;

(b) WHETHER THE DEFENDANT WAS FOUND NOT GUILTY OR NOT GUILTY BY REASON OF INSANITY OF THE PARTICULAR OFFENSE OR COUNT;

(c) IF A NOLLE PROSEQUI WAS ENTERED IN RELATION TO THE PARTICULAR OFFENSE OR COUNT, THE FACT THAT THE NOLLE PROSEQUI WAS ENTERED AND THE

CHARGES WERE DISMISSED, AND ITS SIGNIFICANCE;

(d) IF ANOTHER FINAL DISPOSITION OF THE OFFENSE OR COUNT WAS MADE, A DESCRIPTION OF THE FINAL DISPOSITION AND ITS SIGNIFICANCE.

(3) TO THE EXTENT PRACTICABLE, NOTIFY THE VICTIM OF EACH SUCH OFFENSE OR COUNT WHO ACTUALLY IS PROVIDED NOTIFICATION UNDER DIVISION (B)(2) OF THIS SECTION, IN WRITING, OF THE FINAL RESOLUTION OF ALL OTHER OFFENSES OR COUNTS THAT CHARGE A FELONY OR A MISDEMEANOR OF THE FIRST DEGREE, OTHER THAN THOSE CONTAINED IN TITLE XLV OF THE REVISED CODE, THAT WERE CHARGED AGAINST THE DEFENDANT AND THAT WERE JOINED FOR PROSECUTION WITH, WERE BASED ON THE SAME ACT OR TRANSACTION AS, WERE BASED ON TWO OR MORE ACTS OR TRANSACTIONS CONNECTED TOGETHER OR CONSTITUTING PARTS OF A COMMON SCHEME OR PLAN WITH, OR WERE PART OF A COURSE OF CRIMINAL CONDUCT WITH, THE PARTICULAR OFFENSE OR COUNT.

(C)(1) THE NOTIFICATION REQUIRED BY DIVISION (B)(1) OF THIS SECTION SHALL BE PROVIDED AT LEAST TWO DAYS BEFORE THE TRIAL, ENTRY OF THE NOLLE PROSEQUI, ENTRY OF THE PLEA OF GUILTY OR NO CONTEST, OR OTHER FINAL DISPOSITION OF THE PARTICULAR OFFENSE OR CHARGE, UNLESS THE PROSECUTOR MADE A GOOD FAITH EFFORT [page 3] TO PROVIDE THE NOTIFICATION BUT WAS UNABLE TO DO SO BECAUSE OF HIS INABILITY TO LOCATE THE VICTIM AFTER A REASONABLE EFFORT TO DO SO. IN SUCH A CASE, THE PROSECUTOR IS NOT REQUIRED TO PROVIDE THE NOTIFICATION.

(2) THE NOTIFICATION REQUIRED BY DIVISION (B)(2) OF THIS SECTION SHALL BE PROVIDED AS SOON AS POSSIBLE, BUT NO LATER THAN TWO DAYS, AFTER IT IS POSSIBLE TO DETERMINE THE INFORMATION REQUIRED TO BE PROVIDED UNDER THAT DIVISION, UNLESS THE PROSECUTOR, AFTER THE DETERMINATION OF THAT INFORMATION, MADE A GOOD FAITH EFFORT TO PROVIDE THE NOTIFICATION BUT WAS UNABLE TO DO SO BECAUSE OF HIS INABILITY TO LOCATE THE VICTIM AFTER A REASONABLE EFFORT TO DO SO. IN SUCH A CASE, THE PROSECUTOR IS NOT REQUIRED TO PROVIDE THE NOTIFICATION.

(3) THE NOTIFICATION REQUIRED BY DIVISION (B)(3) OF THIS SECTION SHALL BE PROVIDED AS SOON AS POSSIBLE AFTER IT IS POSSIBLE TO DETERMINE THE INFORMATION REQUIRED TO BE PROVIDED UNDER THAT DIVISION, UNLESS THE PROSECUTOR MADE A GOOD FAITH EFFORT TO PROVIDE THE NOTIFICATION BUT WAS UNABLE TO DO SO BECAUSE OF HIS INABILITY TO LOCATE THE VICTIM AFTER A REASONABLE EFFORT TO DO SO. IN SUCH A CASE, THE PROSECUTOR IS NOT REQUIRED TO PROVIDE THE NOTIFICATION.

(D) A PROSECUTOR SATISFIES THE REQUIREMENTS OF DIVISION (B) OF THIS SECTION PERTAINING TO INFORMING AND NOTIFYING THE VICTIM OF THE OFFENSE BY NOTIFYING:

(1) THE VICTIM'S NEXT OF KIN, IF THE VICTIM IS DECEASED, OR THE VICTIM'S PARENT, LEGAL GUARDIAN, OR NEXT OF KIN, IF THE VICTIM IS UNDER EIGHTEEN YEARS OF AGE;

(2) AN OFFICER OR AGENT OF THE PERSON WHO IS THE VICTIM, IF THE VICTIM IS NOT AN INDIVIDUAL OR IF THE VICTIM IS

A GOVERNMENTAL ENTITY OR INSTRUMENTALITY;

(3) THE THREE VICTIMS THAT THE PROSECUTOR BELIEVES HAVE SUFFERED THE MOST, IF THERE ARE MORE THAN THREE VICTIMS OF THE OFFENSE.

(E) FAILURE OF A PROSECUTOR TO COMPLY WITH DIVISION (B) OF THIS SECTION WITHIN THE TIMES SPECIFIED IN DIVISION (C) OF THIS [page 4] SECTION DOES NOT GIVE, AND SHALL NOT BE CONSTRUED AS GIVING, ANY RIGHTS OR ANY GROUNDS FOR APPEAL OR POST-CONVICTION RELIEF TO THE DEFENDANT.

APPENDIX D

SUB. SENATE BILL 76
Eff. 9-26-84
(Certain provisions eff. other than 9-26-84)

Passed 5-24-84 Approved by Governor 6-27-84
Filed 6-27-84 File No. 222
Chief Sponsor: Carney

To enact section 2937.081 of the Revised Code to required a prosecutor to notify a victim, or a specified representative of a victim, of aggravated murder, murder, aggravated vehicular homicide, felony vehicular homicide, or an aggravated felony of the date, time, and place of the trial of the case pertaining to the offense, or if no trial is held, the date, time, and place at which the entry of a nolle prosequi, guilty plea, or no contest plea, or other final disposition of the offense will be made, and to repeal section 2937.081 of the Revised Code on July 1, 1987.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 2937.081 of the Revised Code be enacted to read as follows:

2937.081 Duty of prosecutor to give victims of crime notice of certain facts concerning resulting prosecution; procedures; limits

Sec. 2937.081. (A) AS USED IN THIS SECTION, "VICTIM" MEANS A PERSON, AS DEFINED IN SECTION 1.59 OF THE REVISED CODE, AND A GOVERNMENTAL ENTITY OR INSTRUMENTALITY, THAT HAS SUFFERED INJURY, DAMAGE, OR DEATH AS A RESULT OF THE COMMISSION OF AN ACT BY ANOTHER THAT IS THE BASIS OF ONE OR

MORE CHARGES OF AN OFFENSE LISTED IN DIVISION (B) OF THIS SECTION.

(B) EXCEPT AS PROVIDED IN DIVISION (E) OF THIS SECTION, A PROSECUTOR WHO IS ASSIGNED FOR PROSECUTION A CRIMINAL CASE THAT INCLUDES ONE OR MORE CHARGES OF A VIOLATION OF SECTION 2903.02, 2903.03, 2903.04, 2903.06, 2903.11, 2905.01, 2905.02, 2905.11, 2907.02, 2907.12, 2909.02, 2911.01, 2911.02, 2911.11, OR 2911.12 OF THE REVISED CODE, A VIOLATION OF SECTION 2903.01 OF THE REVISED CODE IN WHICH THE INDICTMENT OR COUNT IN THE INDICTMENT DOES NOT CONTAIN ONE OR MORE SPECIFICATIONS OF AGGRAVATING CIRCUMSTANCES LISTED IN DIVISION (A) OF SECTION 2929.04 OF THE REVISED CODE, OR A FELONY VIOLATION OF SECTION 2903.07 OF THE REVISED CODE, SHALL NOTIFY THE VICTIM OF EACH OFFENSE OR COUNT CHARGED OF THE DATE, TIME, AND PLACE OF THE TRIAL PERTAINING TO THE PARTICULAR OFFENSE OR COUNT, OR IF THE PARTICULAR OFFENSE OR COUNT CHARGED IS RESOLVED WITHOUT TRIAL, THE DATE, TIME, AND PLACE AT WHICH THE PROSECUTOR WILL ENTER A NOLLE PROSEQUI PERTAINING TO THE OFFENSE OR COUNT, AT WHICH A PLEA OF GUILTY OR NO CONTEST PERTAINING TO THE OFFENSE OR COUNT WILL BE ENTERED, OR AT WHICH FINAL DISPOSITION OF THE OFFENSE OR COUNT OTHERWISE WILL BE MADE. THE NOTIFICATION REQUIRED BY THIS DIVISION SHALL BE PROVIDED IN ACCORDANCE WITH DIVISION (E) OF THIS SECTION.

(C) EXCEPT AS PROVIDED IN DIVISION (E) OF THIS SECTION, IN ANY CASE IN WHICH A PROSECUTOR IS REQUIRED BY DIVISION (B) OF THIS SECTION TO NOTIFY THE VICTIM OF AN OFFENSE OR COUNT OF

THE DATE, TIME, AND PLACE OF THE TRIAL OR OTHER SPECIFIED ACTIVITY PERTAINING TO THE OFFENSE OR COUNT, AND IN WHICH THE TRIAL OR OTHER SPECIFIED ACTIVITY IS CONTINUED OR OTHERWISE CHANGED TO A DIFFERENT DATE OR TIME OR IS MOVED TO A DIFFERENT PLACE, THE PROSECUTOR SHALL NOTIFY THE VICTIM OF THE CONTINUANCE, CHANGE, OR MOVE OF THE TRIAL OR OTHER SPECIFIED ACTIVITY AND OF THE NEW DATE, TIME, AND PLACE OF THE TRIAL OR OTHER SPECIFIED ACTIVITY. THE NOTIFICATION REQUIRED BY THIS DIVISION SHALL BE PROVIDED IN ACCORDANCE WITH DIVISION (E) OF THIS SECTION.

(D) FOR PURPOSES OF PROVIDING THE NOTICES REQUIRED BY THIS SECTION, A VICTIM OF AN OFFENSE, THE NEXT OF KIN OF A DECEASED VICTIM, OR THE PARENT, LEGAL GUARDIAN, OR NEXT OF KIN OF A VICTIM UNDER EIGHTEEN YEARS OF AGE MAY FILE A WRITTEN STATEMENT WITH THE PROSECUTOR THAT DESIGNATES ANOTHER PERSON AS THE AGENT OF THE VICTIM, IDENTIFIES THE AGENT AND THE ORGANIZATION, IF ANY, THAT HE REPRESENTS, AND PROVIDES AN ADDRESS AND TELEPHONE NUMBER AT WHICH THE NOTIFICATIONS CAN BE PROVIDED TO THE AGENT AND THE DAYS OF THE WEEK AND GENERAL TIMES OF DAY AT WHICH THE AGENT CAN BE CONTACTED AT THAT NUMBER, AND IS SIGNED BY THE VICTIM, NEXT OF KIN, PARENT, OR LEGAL GUARDIAN. THE AGENT MAY BE, BUT IS NOT REQUIRED TO BE, AN ATTORNEY. AFTER RECEIPT OF THE WRITTEN STATEMENT, THE PROSECUTOR SHALL PROVIDE EACH SUBSEQUENT NOTIFICATION REQUIRED UNDER THIS SECTION, IN RELATION TO THAT VICTIM, TO THE AGENT

INSTEAD OF THE VICTIM, IN ACCORDANCE WITH DIVISION (E) OF THIS SECTION.

(E) A NOTICE REQUIRED BY DIVISION (B) OR (C) OF THIS SECTION DOES NOT HAVE TO BE PROVIDED BY THE PROSECUTOR UNLESS THE PROSECUTOR, PRIOR TO THE TIME AT WHICH THE NOTICE IS REQUIRED, IS PROVIDED A WRITTEN MEMORANDUM THAT INCLUDES THE ADDRESS AT WHICH THE NOTICE CAN BE SENT TO THE VICTIM, A HOME TELEPHONE NUMBER, AND IF APPLICABLE, A BUSINESS TELEPHONE NUMBER AT WHICH THE VICTIM CAN BE CONTACTED, AND THE DAYS OF THE WEEK AND GENERAL TIMES OF DAY AT WHICH THE VICTIM CAN BE CONTACTED AT EACH TELEPHONE NUMBER PROVIDED. A STATEMENT FILED UNDER DIVISION (D) OF THIS SECTION SUFFICES AS A MEMORANDUM FOR PURPOSES OF THIS DIVISION. IF THE PROSECUTOR IS PROVIDED A MEMORANDUM IN ACCORDANCE WITH THIS DIVISION, HE SHALL PROVIDE EACH SUBSEQUENTLY REQUIRED NOTICE TO THE VICTIM, EITHER BY SENDING IT BY REGULAR MAIL TO THE ADDRESS PROVIDED OR BY COMMUNICATING IT ORALLY, BY TELEPHONE ,AT THE NUMBER PROVIDED. HOWEVER, IF THE PROSECUTOR ATTEMPTS TO ORALLY COMMUNICATE THE NOTICE, BY TELEPHONE, TO THE VICTIM AT EACH TELEPHONE NUMBER PROVIDED, BUT IS UNABLE TO DO SO AFTER AT LEAST THREE GOOD FAITH ATTEMPTS, THE PROSECUTOR IS NOT REQUIRED TO MAKE ANY FURTHER ATTEMPTS TO ORALLY COMMUNICATE THE NOTICE, SEND IT BY REGULAR MAIL, OR PROVIDE IT IN ANY OTHER MANNER. IF THE NOTICE IS COMMUNICATED ORALLY, BY TELEPHONE, THE PROSECUTOR SHALL RECORD THE TELEPHONE NUMBER CALLED,

THE DATE AND TIME OF THE DAY OF THE COMMUNICATION, THE NAME OF THE PERSON TO WHOM THE NOTICE IS GIVEN, AND THE CONTENT OF THE COMMUNICATION. A MEMORANDUM FILED UNDER THIS DIVISION MAY BE MODIFIED BY THE FILING OF A SUBSEQUENT MEMORANDUM.

(F) A PROSECUTOR SATISFIES THE REQUIREMENTS OF DIVISIONS (B) AND (C) OF THIS SECTION PERTAINING TO INFORMING AND NOTIFYING THE VICTIM OF THE OFFENSE BY NOTIFYING:

(1) THE VICTIM'S NEXT OF KIN, IF THE VICTIM IS DECEASED, OR THE VICTIM'S PARENT, LEGAL GUARDIAN, OR NEXT OF KIN, IF THE VICTIM IS UNDER EIGHTEEN YEARS OF AGE;

(2) AN OFFICER OR AGENT OF THE PERSON WHO IS THE VICTIM, IF THE VICTIM IS NOT AN INDIVIDUAL OR IF THE VICTIM IS A GOVERNMENTAL ENTITY OR INSTRUMENTALITY;

(3) THE THREE VICTIMS THAT THE PROSECUTOR BELIEVES HAVE SUFFERED THE MOST, IF THERE ARE MORE THAN THREE VICTIMS OF THE OFFENSE;

(4) THE AGENT OF THE VICTIM, NEXT OF KIN, PARENT, OR LEGAL GUARDIAN DESIGNATED IN ACCORDANCE WITH DIVISION (D) OF THIS SECTION;

(5) IN ALL OTHER CASES, THE VICTIM.

(G) FAILURE OF A PROSECUTOR TO COMPLY WITH THE NOTICE PROVISIONS OF THIS SECTION DOES NOT GIVE, AND SHALL NOT BE CONSTRUED AS GIVING, ANY RIGHTS OR ANY GROUNDS FOR APPEAL OR POST-CONVICTION RELIEF TO THE DEFENDANT.

SECTION 2. That section 2937.081 of the Revised Code, as enacted by Section 1 of this act, is hereby repealed, effective July 1, 1987.

APPENDIX E

AMENDED SUBSTITUTE SENATE BILL NO. 6

Act Effective Date: 6-10-87
Date Passed: 5-20-87
Date Approved by Governor: 6-10-87
Date Filed: 6-11-87
File Number: 16
Chief Sponsor: WATTS

General and Permanent Nature: Per the Director of the Ohio Legislative Service Commission, this Act's section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Emergency: Pursuant to O Const, Art II, Section 1d, this Act was declared to be an emergency measure necessary for the preservation of the public peace, health, and safety. See Act section 6.

To amend section 122.04, 2919.25, 2943.041, 2945.07, and 2967.03 of the Revised Code to permit victims of certain crimes to make statements at the time of sentencing, if the case is resolved at trial, or at the proceeding at which it is resolved, if it is resolved without trial, and to expand the offense of domestic violence; to repeal Sections 3 and 4 of Sub. S.B. 172 of the 115th General Assembly to eliminate the scheduled July 2, 1987, repeal of the crime victims rights provisions of sections 2943.041, 2945.07, 2949.12, 2967.03, and 2967.12 of the Revised Code and thereby to retain the requirement that a court note in the case record the presence of a victim or a family member of a deceased victim of specified violent crimes at trial or at a proceeding

at which the charge is resolved without trial and give the victim or family member specified information to enable him to determine the final disposition of the charge and notification of his right to request the Adult Parole Authority to inform him when the defendant is considered for commutation, pardon, or parole, and to continue to permit such a victim or family member to make a statement relative to the victimization and [page end] the sentencing of the offender and to submit a written statement to be considered by the Adult Parole Authority before commutation, pardon, or parole in certain cases; to repeal Section 2 of Sub. S.B. 76 of the 115th General Assembly to eliminate the scheduled July 1, 1987, repeal of section 2937.081 and thereby to continue to require a prosecutor to notify a victim of specified violent crimes or his designated representative of the date, time, and place of the trial or other proceeding at which final disposition of the charge of the crime is to be made to repeal Section 3, 4 and 5 of Am. Sub. S.B. 96 of the 115th General Assembly to continue to permit the Department of Development to authorize qualifying neighborhood organizations to employ attorneys to assist crime victims who reside in the neighborhood; and to declare an emergency.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 122.04, 2919.25, 2943.041, 2945.07, and 2967.03 of the Revised Code be amended to read as follows:

122.04 Development duties [Eff. 6-10-87]

The department of development shall:

(A) Maintain a continuing evaluation of the sources available for the retention, development or expansion of industrial and commercial facilities in this state through both public and private agencies;

(B) Assist public and private agencies in obtaining information necessary to evaluate the desirability of the retention, construction, or expansion of industrial and commercial facilities in the state;

(C) Facilitate contracts between community improvement corporations organized under Chapter 1724, of the Revised Code or Ohio development corporations organized under Chapter 1726, of the Revised Code and industrial and commercial concerns seeking to locate or expand in Ohio;

(D) Upon request, consult with public agencies or authorities in the preparation of studies of human economic needs or advantages relating to economic and community development;

(E) Encourage, promote, and assist trade and commerce between this state and foreign nations;

(F) Promote and encourage persons to visit and travel within this state;

(G) Maintain membership in national association of state development agencies;

(H) Accept and review applications that are filed pursuant to section 122.95 of the Revised Code for authority to employ attorneys to assist crime victims and make determinations concerning the applications;

(I) Assist in the development of facilities and technologies that will lead to increased, environmentally sound use of Ohio coal.

~~This section is an interim section effective until July 1, 1987.~~

2919.25 Domestic violence [Eff. 6-10-87]

(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

(B) No person shall recklessly cause serious physical harm to a family or household member.

(C) NO PERSON, BY THREAT OF FORCE, SHALL KNOWINGLY CAUSE A FAMILY OR HOUSEHOLD MEMBER TO BELIEVE THAT

THE OFFENDER WILL CAUSE IMMINENT PHYSICAL HARM TO THE FAMILY OR HOUSEHOLD MEMBER.

(D) Whoever violates this section is guilty of domestic violence. ~~domestic violence~~ A VIOLATION OF DIVISION (C) OF THIS SECTION IS A MISDEMEANOR OF THE FOURTH DEGREE. A VIOLATION OF DIVISION (A) OR (B) OF THIS SECTION IS a misdemeanor of the first degree. If the offender previously HAS been convicted of domestic violence or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of such violation, domestic violence A VIOLATION OF DIVISION (A) OR (B) OF THIS SECTION is a felony of the fourth degree.

~~(D)~~(E) As used in this section and section 2919.26 of the Revised Code:

(1) "Family or household member" means a spouse, a person living as a spouse, a former spouse, or a parent, a child, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse, who is residing or has resided with the offender.

(2) "Person living as a spouse" means a person who is living with another in a common law marital relationship or who is otherwise cohabitating with another.

2943.041 Rights of crime victim in regard to prosecution of defendant [Eff. 6-10-87]

(A) In any case in which a person is charged with a violation of section 2903.02, 2903.03, 2903.04, 2903.06, 2903.11, 2903.12, 2903.13, 2903.21, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.12, 2909.02, 2909.03, 2909.05, 2911.01, 2911.02, 2911.11, ~~or~~ 2911.12, 2919.25, 2921.03, OR 2921.04 of the Revised Code, a violation of section 2903.01 of the Revised Code in which the indictment or count in the indictment does not contain one or more specifications of aggravating circumstances listed in

division (A) of section 2929.04 of the Revised Code, or a felony violation of section 2903.07 of the Revised Code, OR A VIOLATION OF AN EXISTING OR FORMER MUNICIPAL ORDINANCE OR LAW OF THIS OR ANY OTHER STATE OR THE UNITED STATES IN SITUATIONS IN WHICH THE VIOLATION IS SUBSTANTIALLY EQUIVALENT TO ANY OF THOSE VIOLATIONS, if the charge is resolved without trial through the entry of a nolle prosequi, through the entry of a plea of guilty or no contest, or through any other final disposition other than by trial, the court shall determine whether the victim of the act that was the basis of the charge, or a representative member of the victim's family if the victim died as a result of that act, is present at the hearing or proceeding at which the charge is resolved. If the court determines that the victim or a representative member of the victim's family is present at the hearing or proceeding to be indicated in the record of the case and, shall provide the victim or representative family member with the written notice described in division (B) of this section. ~~The~~ AND SHALL INFORM THE VICTIM OR REPRESENTATIVE FAMILY MEMBER THAT HE IS ENTITLED TO MAKE A STATEMENT RELATIVE TO THE VICTIMIZATION AND, IF APPLICABLE, THE SENTENCING OF THE OFFENDER, AND THE court, ~~in its discretion~~ and subject to any REASONABLE terms and conditions it imposes, ~~may~~ SHALL permit the victim or representative family member IF HE SO DESIRES, personally TO make SUCH a statement ~~relative to the victimization and, if applicable, the sentencing of the offender.~~ THE COURT, IN ITS DISCRETION, MAY REQUIRE THAT THE STATEMENT BE MADE ORALLY OR IN WRITING. If a victim or representative member of a victim's family personally makes a statement under authority of this division, the name of the victim or representative family member and

the fact that such a statement was made shall be indicated in the record of the case.

(B)(1) In any case in which a person is charged with any violation described in division (A) of this section, if the court determines that the victim of the act that was the basis of the charge, or a representative member of the victim's family if the victim died as a result of that act, is present at a haring or proceeding of the type described in division (A) of this section and regardless of whether the victim or representative family member makes or is permitted to make a statement at the hearing or proceeding, the court shall provide the victim or representative family member with written notice of all of the following: [page end]

(a) The name of the person charged with the violation;

(b) The case or docket number assigned to the charge;

(c) A telephone number or numbers that the victim or representative family member may call in the future, during normal business hours, for information about the final resolution of the charge; about any sentence imposed upon the offender relative to that charge, or, if that charge is dismissed and the person enters a plea of guilty or no contest to a charge of any offense based on or connected with the act that was the basis of that charge or to a charge of any offense that was joined for prosecution with that charge, about any sentence imposed relative to that plea; and about any action taken in relation to any such sentence, including whether it has been suspended and the offender has been placed on probation, whether the offender has been granted a furlough, whether the offender has been pardoned or paroled or has had his sentence commuted, and whether any other action has been taken that has resulted or will result in the offender's release from imprisonment prior to the expiration of that sentence.

(2) A notice required by division (B)(1) of this section also shall indicate that if the person charged with the violation is sentenced and his sentence requires that he serve a term of imprisonment in a state penal or reformatory institution, the victim or the representative member of the victim's family may provide the adult parole authority with a memorandum including both an address and telephone number at which notice can be provided to him and the name of the offender, and that if such a memorandum is provided, the victim or representative family member will be notified by the adult parole authority before the offender is recommended for a pardon or commutation or is granted a parole, the victim or representative family member, after receipt of such a notification, may send a written statement relative to the victimization and the pending action to the adult parole authority, and the adult parole authority will consider any such statement prior to the recommending a pardon or commutation for or granting a parole to the offender. The notice required by division (B)(1) of this section shall include an address and telephone number for the adult parole authority.

(3) The court shall ensure that the notice required by division (B)(1) of this section is provided to a particular victim or a representative member of his family no later than the date of the sentencing of the person charged with committing an offense against that victim. If a victim or representative member of a deceased victim's family who is provided the notice required by division (B)(1) of this section calls a telephone number, during normal business hours, that the notice indicates may be called for information, and identifies himself, the person charged with the violation described in division (A) of this section, and the case or docket number assigned to the offense or count charged, the victim or the representative family member shall be informed of the final resolution of the charge, and, if

applicable, any sentence imposed upon the person relative to that charge or relative to a plea to a charge based on or connected with that charge or a plea to a charge that was joined for prosecution with that charge, and any action taken in relation to any such sentence.

(C) If a ~~court orders a~~ statement ~~made~~ IS GIVEN ORALLY at a hearing or proceeding, under authority of division (A) of this section, by a victim or a representative member of a victim's family, THE COURT SHALL ORDER THE STATEMENT to be transcribed or recorded ~~and if~~ IF SUCH A STATEMENT IS GIVEN, EITHER ORALLY OR IN WRITING, AND the person who was charged with the violation described in division (A) of this section OFFENSE is sentenced to serve a term of imprisonment ~~in a state penal or reformatory institution~~ relative to ~~that~~ THE charge FOR WHICH THE STATEMENT WAS MADE or relative to a plea to a charge based on or connected with that charge or a plea to a charge that was joined for prosecution with that charge, the transcribed or recorded ORAL statement OR THE SUBMITTED WRITTEN STATEMENT shall be sent to the adult parole authority ~~and~~n ~~shall not~~ IF THE TERM OF IMPRISONMENT IS TO BE SERVED IN A STATE PENAL OR REFORMATORY INSTITUTION, OR TO THE DEPARTMENT OF PROBATION ESTABLISHED BY OR THE PROBATION OFFICERS APPOINTED BY THE COURT IN WHICH THE SENTENCE WAS IMPOSED, IF THE TERM OF IMPRISONMENT IS TO BE SERVED IN A COUNTY JAIL, COUNTY REHABILITATION WORK CAMP, JAIL OR WORKHOUSE OF A MUNICIPAL CORPORATION, OR JAIL OR WORKHOUSE ESTABLISHED BY MORE THAN ONE MUNICIPAL CORPORATION OR BY ONE OR MORE COUNTIES AND ONE OR MORE MUNICIPAL CORPORATIONS. IN NO CASE SHALL ANY SUCH STATEMENT be included in any record at the institution in which the person is

incarcerated. The adult parole authority OR PROBATION DEPARTMENT OR OFFICERS shall maintain a file of transcripts and recordings AND WRITTEN STATEMENTS it is sent under this division.

(D) The failure of a court to comply with the provisions of this section does not give, and shall not be construed as giving, any rights, or any grounds for appeal or post-conviction relief to the defendant in the case.

2945.07 Recording presence of crime victim or member of family at trial; notices to be given [Eff. 6-10-87]

(A)(1) In any case in which a person is charged with a violation of section 2903.02, 2903.03, 2903.04, 2903.06, 2903.11, 2903.12, 2903.13, 2903.21, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.12, 2909.02, 2909.03, 2909.05, 2911.01, 2911.02, 2911.11, 2911.12, 2919.25, 2921.03, OR 2921.04 of the Revised Code, a violation of section 2903.01 of the Revised Code in which the indictment or count in the indictment does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, or a felony violation of section 2903.07 of the Revised Code, OR A VIOLATION OF AN EXISTING OR FORMER MUNICIPAL ORDINANCE OR LAW OF THIS OR ANY OTHER STATE OR THE UNITED STATES IN SITUATIONS IN WHICH THE VIOLATION IS SUBSTANTIALLY EQUIVALENT TO ANY OF THOSE VIOLATIONS, if the person is brought to trial on the charge the court shall determine whether the victim of the act that was the basis of the charge, or a representative member of the victim's family if the victim died as a result of that act, is present at the trial. If the person is tried before a jury, the court shall not make the determination in the presence of the jury. If the court determines that the victim or a representative member of the

victim's family is present at any session of the trial, the court shall require the victim's or representative family member's name and the fact that he was present at the trial to be indicated in the record of the case and shall provide the victim or the representative family member with the written notice described in division (B) of this section. ~~This section does not authorize any victim or representative member of a victim's family, or any attorney or agent for a victim or representative member of a victim's family, to make any statement at the trial.~~

(2) IN ANY CASE IN WHICH A PERSON IS CHARGED WITH ANY VIOLATION DESCRIBED IN DIVISION (A) OF THIS SECTION, IF THE PERSON IS BROUGHT TO TRIAL ON THE CHARGE AND IS CONVICTED OF THAT OFFENSE OR ANOTHER OFFENSE ARISING OUT OF THE ACT THAT WAS THE BASIS OF THE CHARGE, THE COURT, PRIOR TO IMPOSING SENTENCE ON THE OFFENDER, SHALL DETERMINE WHETHER THE VICTIM OF THE ACT THAT WAS THE BASIS OF THE CHARGE, OR A REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY IF THE VICTIM DIED AS A RESULT OF THAT ACT, IS PRESENT AT THE SENTENCING PHASE OF THE TRIAL. IF THE COURT DETERMINES THAT THE VICTIM OR A REPRESENTATIVE MEMBER OF THE VICTIM'S FAMILY IS PRESENT AT THAT PHASE, THE COURT SHALL INFORM THE VICTIM OR REPRESENTATIVE FAMILY MEMBER THAT HE IS ENTITLED TO MAKE A STATEMENT RELATIVE TO THE VIC- [page end] TIMIZATION AND THE SENTENCING OF THE OFFENDER, AND THE COURT, SUBJECT TO ANY REASONABLE TERMS AND CONDITIONS IT IMPOSES, SHALL PERMIT THE VICTIM OR REPRESENTATIVE FAMILY MEMBER IF HE SO DESIRES PERSONALLY TO MAKE A

STATEMENT AT THE TIME OF SENTENCING RELATIVE TO THE VICTIMIZATION AND THE SENTENCING OF THE OFFENDER. THE COURT, IN ITS DISCRETION, MAY REQUIRE THAT THE STATEMENT BE MADE ORALLY OR IN WRITING. IF A VICTIM OR REPRESENTATIVE MEMBER OF A VICTIM'S FAMILY PERSONALLY MAKES A STATEMENT UNDER AUTHORITY OF THIS DIVISION, THE NAME OF THE VICTIM OR REPRESENTATIVE FAMILY MEMBER AND THE FACT THAT THE STATEMENT WAS MADE SHALL BE INDICATED IN THE RECORD OF THE CASE.

(B)(1) In any case in which a person is charged with any violation described in division (A)(1) of this section, if the court determines that the victim of the act that was the basis of the charge, or a representative member of the victim's family if the victim died as a result of that act, is present at any session of the trial on the charge, the court shall provide the victim or representative family member with written notice of all of the following:

(a) The name of the person charged with the violation;

(b) The case or docket number assigned to the charge;

(c) A telephone number or numbers that the victim or representative family may call in the future, during normal business hours, for information about the final resolution of the charge, about any sentence imposed upon the defendant relative to that charge, and about any action taken in relation to any such sentence, including whether it has been suspended and the defendant has been placed on probation, whether the defendant has been granted a furlough, whether the defendant has been pardoned or paroled or has had his sentence commuted, and whether any other action has been taken that has resulted or will result in the defendant's release from imprisonment prior to the expiration of that sentence.

(2) A notice required by division (B)(1) of this section also shall indicate that if the person charged with the violation is sentenced and his sentence requires that he serve a term of imprisonment in a state penal or reformatory institution, the victim or the representative member of the victim's family may provide the adult parole authority with a memorandum including both an address and telephone number at which notice can be provided to him and the name of the offender, and that if such a memorandum is provided, the victim or representative family member will be notified by the adult parole authority before the defendant is recommended for a pardon or commutation or is granted a parole, the victim or representative family member, after receipt of such a notification, may send a written statement relative to the victimization and the pending action to the adult parole authority, and the adult parole authority will consider any such statement prior to recommending a pardon or commutation for or granting a parole to the defendant. The notice required by division (B)(1) of this section shall include an address and telephone number for the adult parole authority.

(3) The court shall ensure that the notice required by division (B)(1) of this section is provided to a particular victim or a representative member of his family no later than the date of the sentencing of the person charged with committing an offense against that victim. If a victim or representative member of a deceased victim's family who is provided the notice required by division (B)(1) of this section calls a telephone number, during normal business hours, that the notice indicates may be called for information, and identifies himself, the person charged with the violation described in division (A)(I) of this section, and the case or docket number assigned to the offense or count charged, the victim or the representative family member shall be informed of the final resolution of the charge, and, if

applicable, any sentence imposed upon the person charged, and any action taken in relation to any such sentence.

(C) IF A STATEMENT IS GIVEN ORALLY AT THE TIME OF SENTENCING OF AN OFFENDER, UNDER AUTHORITY OF DIVISION (A)(2) OF THIS SECTION, BY A VICTIM OR A REPRESENTATIVE MEMBER OF A VICTIM'S FAMILY, THE COURT SHALL ORDER THE STATEMENT TO BE TRANSCRIBED OR RECORDED. IF THE STATEMENT IS GIVEN, EITHER ORALLY OR IN WRITING, AND THE OFFENDER IS SENTENCED TO SERVE A TERM OF IMPRISONMENT RELATIVE TO THE OFFENSE FOR WHICH THE STATEMENT WAS MADE, THE TRANSCRIBED OR RECORDED ORAL STATEMENT OR THE SUBMITTED WRITTEN STATEMENT SHALL BE SENT TO THE ADULT PAROLE AUTHORITY, IF THE TERM OF IMPRISONMENT IS TO BE SERVED IN A STATE PENAL OR REFORMATORY INSTITUTION, OR TO THE DEPARTMENT OF PROBATION ESTABLISHED BY, OR THE PROBATION OFFICERS APPOINTED BY, THE COURT IN WHICH THE SENTENCE WAS IMPOSED, IF THE TERM OF IMPRISONMENT IS TO BE SERVED IN A COUNTY JAIL, COUNTY REHABILITATION WORK CAMP, JAIL OR WORKHOUSE OF A MUNICIPAL CORPORATION, OR JAIL OR WORKHOUSE ESTABLISHED BY MORE THAN ONE MUNICIPAL CORPORATION OR BY ONE OR MORE COUNTIES AND ONE OR MORE MUNICIPAL CORPORATIONS. IN NO CASE SHALL ANY SUCH STATEMENT BE INCLUDED IN ANY RECORD AT THE INSTITUTION IN WHICH THE PERSON IS INCARCERATED. THE ADULT PAROLE AUTHORITY OR PROBATION DEPARTMENT OR OFFICERS SHALL MAINTAIN A FILE OF TRANSCRIPTS AND RECORDINGS AND WRITTEN

STATEMENTS IT IS SENT UNDER THIS DIVISION.

(D) The failure of a court to comply with the provisions of this section does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to the defendant in the case.

2967.03 Pardon, commutation, or reprieve (Eff. 6-10-87]

The adult parole authority may exercise its functions and duties in relation to the pardon, commutation, or reprieve of a convict upon direction of the governor or upon its own initiative, and in relation to the parole of a prisoner eligible for parole, upon the initiative of the head of the institution wherein the prisoner is confined, or upon its own initiative. When a prisoner becomes eligible for parole, the head of the institution in which such prisoner is confined shall notify the authority in the manner prescribed by the authority. The authority may investigate and examine, or cause the investigation and examination of, prisoners confined in state penal or reformatory institutions concerning their conduct therein, their mental and moral qualities and characteristics, their knowledge of a trade or profession, their former means of livelihood, their family relationships, and any other matters affecting their fitness to be at liberty without being a threat to society.

The authority may recommend to the governor the pardon, commutation, or reprieve of sentence of any convict or prisoner, or grant a parole to any prisoner, if in its judgment there is reasonable grounds to believe that, if the convict is granted a pardon, commutation, or reprieve, or the prisoner is paroled, such action would further the interests of justice and be consistent with the welfare and security of society. However, the authority shall not recommend a pardon or commutation of sentence of, or grant a parole to, any convict or

prisoner until the authority has complied with the applicable notice requirements of section 2967.12 of the Revised Code, and has considered any statement made by a victim or a representative member of a victim's family that is relevant to the convict's or prisoner's case and that was sent to the authority pursuant to division (C) of section 2943.041 OR DIVISION (C) OF SECTION 2945.07 of the Revised Code and any other statement made by a victim or a representative member of a victim's family that is relevant to the convict's or prisoner's case and that was [page end] received by the authority after it provided notice of the pendency of the action under section 2967.12 of the Revised Code. The trial judge and prosecuting attorney of the trial court in which a person was convicted shall furnish, at the request of the authority, a summarized statement of the facts proved at the trial, and of all other facts having reference to the propriety of recommending a pardon or commutation, or granting a parole, together with a recommendation for or against a pardon, commutation, or parole, and the reasons for such recommendation. All state and local officials shall furnish information to the authority, when so requested by it in the performance of its duties.

SECTION 2. That existing sections 122.04, 2919.25, 2943.041, 2945.07, and 2967.03 of the Revised Code are hereby repealed.

SECTION 3. Sections 3 and 4 of Substitute Senate Bill No. 172 of the 115th General Assembly are hereby repealed. This Section removes all limitations upon the continued existence of sections 2943.041 and 2945.07 of the Revised Code, and also prevents the amendments to sections 2949.12, 2967.03, and 2967.12 of the Revised Code that were to have been effective on July 1, 1987, from taking effect. The operation of this Section as to sections 2943.041 and 2945.07 of the Revised Code is not affected by the rule of construction contained in section 1.57 of the Revised Code.

SECTION 4. Section 2 of Substitute Senate Bill No. 76 of the 115th General Assembly is hereby repealed. This Section removes all limitations upon the continued existence of section 2937.081 of the Revised Code. The operation of this Section is not affected by the rule of construction contained in section 1.57 of the Revised Code.

SECTION 5. Sections 3, 4, and 5 of Amended Substitute Senate Bill No. 96 of the 115th General Assembly are hereby repealed. This Section removes all limitations upon the continued existence of section 122.95 of the Revised Code, and also prevents the amendment of section 122.04 of the Revised Code that was to have been effective July 1, 1987. The operation of this Section as to section 122.95 of the Revised Code is not affected by the rule of construction contained in section 1.57 of the Revised Code.

SECTION 6. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity is that victims of crime and family members of deceased victims of crime urgently need to be able to rely upon the continued and uninterrupted protections and involvement in the judicial process provided by the provisions of existing sections 122.04, 2937.081, 2943.041, 2945.07, 2949.12, 2967.03, and 2967.12 of the Revised Code and the modifications in sections 2943.041, 2945.07, and 2967.03 made by this act. Therefore, this act shall go into immediate effect. [page end]

AMICUS CURIAE

BRIEF

MOTION FILED
DEC 17 1990

(14)

No. 89-1944

IN THE

Supreme Court of the United States

October Term, 1990

STATE OF OHIO,

Petitioner,

v.

EDIBERTO HUERTAS,

Respondent.

On Writ of Certiorari To The
Supreme Court of Ohio

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NATIONAL JURY PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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December 17, 1990

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No. 89-1944

IN THE

Supreme Court of the United States

October Term, 1990

STATE OF OHIO,

Petitioner,

v.

EDIBERTO HUERTAS,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF NATIONAL JURY PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

Pursuant to Rule 37.4 of the Rules of this Court, the National Jury Project respectfully moves for leave to file the attached brief amicus curiae in support of Respondent. Respondent has consented to the filing of this brief but petitioner refused to consent, thus requiring the filing of this motion.

The National Jury Project [NJP] is a not-for-profit corporation established in 1975 for the purpose of studying the American jury system and maintaining and strengthening that system. The NJP maintains offices in Philadelphia, Pennsylvania, Minneapolis, Minnesota, and Oakland, California, and provides consultation and educational services to attorneys and social science professionals, in criminal and civil litigation in federal and state courts throughout the United States.

The NJP has published two texts: Jurywork: Systematic Techniques (2d ed 1983), and The Jury System: New Methods of Reducing Prejudice (1975). Members of the NJP have written numerous articles for legal and social science journals and contributed to texts on subjects related to juries. NJP members are frequent speakers at training seminars for criminal and civil trial lawyers throughout the United States, including seminars conducted by the American Bar Association and the Practicing Law Institute.

The National Jury Project has also assisted attorneys in jury selection in thousands of civil and criminal trials. NJP members have been invited to give testimony before congressional committees and committees of many state legislatures, have submitted affidavits

in numerous cases -- on issues of pretrial publicity, venue, jury composition, survey research, jury selection procedure, the use of peremptory challenges and strike procedures -- and have qualified as expert witnesses in numerous federal and state courts.

The NJP is committed to work to preserve the integrity of the American system of trial by jury. The central issue in Ohio v. Huertas, No. 89-1944, is the constitutionality of testimony by the father of the homicide victim who told the sentencing jury in this capital case that he wanted the defendant to be executed. Such testimony poses a grave threat to the proper functioning of the jury in a capital sentencing trial. The attached brief is addressed to that issue only.

The parties before the Court have not adequately developed the issue with which the NJP is concerned. They have not described the significance of the testimony of the victim's father to the present case, and they have not explored the ramifications of the questions it raises for other criminal jury trials, capital and non-capital alike. Through its work over the past fifteen years, the NJP has acquired a great deal of expertise on issues that bear on the functioning of juries. The NJP respectfully submits that the attached brief may fill some of the gaps in the parties' presentations, and might provide some assistance to the Court. Accordingly, the NJP respectfully requests that its motion to file this

brief as amicus curiae in support of Respondent be granted.

Respectfully submitted,

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No. 89-1944

IN THE

Supreme Court of the United States

October Term, 1990

STATE OF OHIO,

Petitioner,

v.

EDIBERTO HUERTAS,

Respondent.

BRIEF OF NATIONAL JURY PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

QUESTION PRESENTED

Amicus Curiae will address the following question:

> Does the Constitution permit the prosecutor in the sentencing phase of a capital trial to present sworn testimony in which a parent of the victim of the homicide on trial tells the jury that he wants the defendant to be executed?

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INTEREST OF AMICUS CURIAE

The interest of the National Jury Project as amicus curiae is set forth in the accompanying Motion for Leave to file this brief.

STATEMENT OF THE CASE

Respondent Ediberto Huertas was convicted of the murder of Ralph Harris, Jr., and sentenced to death. The killing was provoked by a love triangle -- Mr. Harris had recently started a romantic relationship with Mr. Huertas's long-time paramour, Elba Ortiz (J.A. 4, 8-9), with whom Mr. Huertas had two children. (J.A. 22.) Mr. Huertas and Mr. Harris had been friends for years; they knew each other since high school. (J.A. 18-19.) On the night of the killing Mr.

Huertas drank heavily, smoked marijuana, and ingested a substantial quantity of cocaine. (Pet. App. 4-8.)

Following Respondent's conviction, the trial court ordered a presentence investigation and report. The report that was prepared (J.A. 151-200) includes summaries of interviews with the victim's parents. In these interviews Mrs. Harris said, among other things, "that God has the only right to punish the defendant, and that the Court should do what it has to do," and Mr. Harris said "that the defendant deserves to get the death penalty." (J.A. 162.)

At the penalty phase, after Respondent completed his case in mitigation, the prosecutor moved to admit the presentence report in evidence. (J.A. 96.) The court admitted the report, over objection by Respondent's

counsel. (J.A. 96-102.) The prosecution also called two witnesses at the penalty phase, the victim's mother and the victim's father. On cross-examination, Mrs. Harris repeated her earlier statement that Respondent's punishment should be left up to the courts and to God (J.A. 141). Mr. Harris testified on direct examination, over objection, that he wanted Respondent to be sentenced to death. (J.A. 146.)

On appeal, the Supreme Court of Ohio vacated Respondent's death sentence. The syllabus of the court's opinion states a single ground for the decision: Mr. Harris's testimony requesting a death sentence "violate[d] the defendant's constitutional right to have the sentencing decision made by the jury and the judge." State v. Huertas, 51 Ohio St.3d 22, 553 N.E.2d 1058, 1060 (1990).

SUMMARY OF THE ARGUMENT

This case has been presented to the Court as an opportunity to reconsider the Court's decisions in Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 109 S.Ct. 2207 (1989). That is how the case was described in the petition for a writ of certiorari, in the brief in opposition to the petition, in the petitioner's brief on the merits, and in several briefs amicus curiae in support of petitioner. In fact, the central issue in the case before the Court is very different from the question in those cases.

In Booth and Gathers this Court held that the Eighth Amendment precludes the prosecution from presenting "victim impact evidence" at the sentencing phase

of a capital case. The decisive issue here, however, is the propriety and constitutionality of testimony by the father of the homicide victim, who told the sentencing jury that he wanted Respondent to be executed for his son's death. The Supreme Court of Ohio reversed Respondent's death sentence because of the admission of the victim's father's testimony. The syllabus of the opinion of the court refers exclusively to the impropriety of such testimony; under Ohio law, only the syllabus and not the accompanying opinion states the rule of law pronounced by the Ohio Supreme Court. Williamson v. Radich, 128 Ohio St. 124, 126, 190 N.E. 403, 404 (1934); Beck v. Ohio, 379 U.S. 89, 93 n.2 (1964).

Victim impact evidence of the sort considered in Booth and Gathers includes factual information about the life and

character of a homicide victim, and about the impact of the victim's death on his or her relatives. The testimony at issue here presented no information. It was simply an appeal from the witness box to the jury to sentence the defendant to death. Such testimony is never allowed in American trials, civil or criminal. Its use violates a central premise of our system of trial by jury: witnesses present information but do not judge it, while jurors judge information that is presented to them but may not gather any on their own.

In civil cases, the admission of testimony in which a witness asks for a particular outcome merely constitutes error under the governing law of evidence. The same may be true in some criminal trials. In a capital sentencing jury trial, however, it is error of

constitutional dimensions.

In Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153 (1976), this Court held that the arbitrary imposition of the death penalty violates the cruel and unusual punishments clause of the Eighth Amendment. In numerous cases since Furman and Gregg, the Court has taken great pains to prevent arbitrary capital sentencing. The type of testimony that was presented here is bound to produce arbitrary results. It is inflammatory. It invites the jury to decide the defendant's fate on the basis of passion rather than reasoned consideration of the evidence in aggravation and mitigation. It may lead jurors to abdicate their responsibility to judge the appropriate sentence, and instead simply to defer to the wishes of the bereaved witness. In

many cases, it will make the imposition of a death sentence depend on the victim's family's attitude toward capital punishment.

The decision of the Supreme Court of Ohio is correct, both under general principles of Ohio evidence law, and under this Court's precedents on Eighth Amendment restrictions on the use of the death penalty. Accordingly, that decision should be affirmed.

ARGUMENT

I. THE PROPRIETY OF TESTIMONY BY THE FATHER OF THE VICTIM REQUESTING A DEATH SENTENCE IS THE CENTRAL ISSUE IN THIS CASE.

In their initial presentations to the Court, the parties have not fairly described the nature of this case. In

his Petition for a Writ of Certiorari, the Prosecuting Attorney of Lorain County, Ohio, presented the following question:

> Whether the Ohio Supreme Court has wrongfully interpreted Booth v. Maryland (1987), 107 S. Ct. 2529, and South Carolina v. Gathers (1989), 109 S. Ct. 2207, to require exclusion of all victim testimony during the penalty phase of a capital trial and by further holding that the effect of the victim's death on the surviving family members is not relevant to the defendant's personal responsibility and moral guilt when the defendant intimately knew his victim, his victim's family, and of the trauma his decision to kill would cause.

The opinion below sounds a different note. Immediately following the caption, the syllabus of the opinion of the Ohio Supreme Court describes the holding as follows:

> Expressions of opinion by a witness as to the appropriateness of a particular sentence in a capital case

> violate the defendant's constitutional right to have the sentencing decision made by the jury and judge.

State v. Huertas, 51 Ohio St.3d 22, 553 N.E.2d 1058, 1060 (1990).

Such a description would be significant for any appellate opinion, but it is doubly so in Ohio, where "Only that which is stated in a syllabus... represents a pronouncement of the law of Ohio." Manchester v. Kebe, 49 Ohio St.2d 148, 150, 359 N.E.2d 74, 76 (1976). See also Williamson v. Radich, 128 Ohio St. 124, 126, 190 N.E. 403, 404 (1934); Beck v. Ohio, 379 U.S. 89, 93 n.2 (1964) (Stewart, J.) ("For more than 100 years the rule in Ohio has been that its Supreme Court, except for per curiam opinions, speaks as a court only through the syllabi of its cases.").

The body of the opinion is consistent:

> "We therefore hold expressions of opinion by a witness as to the appropriateness of a particular sentence in a capital case violate the defendant's constitutional right to have the sentencing decision made by the jury and judge."

Huertas, 51 Ohio St.3d at 27, 553 N.E.2d at 1065. This is the only place in the opinion in which the Ohio Supreme Court purports to describe a holding. While there were other questions before that court -- including the effect of victim impact evidence of the types presented in Booth and Gathers -- this was the issue on which the Ohio Supreme Court decided the case: The propriety of the victim's father's testimony requesting a death sentence.

The distinction between this case and Booth and Gathers is not minor or technical. The issue in Booth was

whether the Cruel and Unusual Punishments clause of the Eighth Amendment prohibits the prosecution from presenting evidence in a capital sentencing proceeding "describing the effect of the crime on the victim and his family." 482 U.S. 496, 498. Various other definitions of "victim impact evidence" have been offered by Justices of this Court in dissent in Booth and Gathers,[1] and by amici urging reversal in the instant case.[2] All formulations, however, define

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[1] E.g., Booth, 482 U.S. at 516 (Justice White, dissenting) ("the harm that a murderer causes a victim's family,"); Gathers, 109 S.Ct. at 2217 (Justice Scalia, dissenting) ("the admirable personal characteristics of the particular victim and the particular injury caused to the victim's family and fellow citizens.").

[2] E.g., Br. of United States as Amicus Curiae, at 10 ("the harm caused by a murderer to the victim's relatives and loved ones and to society in general."); Br. of the State of California as Amicus Curiae, at 14 ("the impact on the victim,

such evidence as factual information bearing on the victim and his or her family.

The father's testimony here contained no information at all. It was not even an expression of opinion in the usual evidentiary sense. It was a plea for a death sentence, an argument -- and a type of argument that not even an attorney would be permitted to make, since it expressed his deepest personal desires:[3]

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his or her family, and society caused by a murder....).

[3] See, e.g., ABA Model Rules of Professional Conduct, Rule 3.4(e) ("A lawyer shall not:....state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused...."); ABA Model Code of Professional Responsibility, DR 7-106(C)(4)(same); ABA Standards Relating to the Administration of Criminal Justice, Ch. 3, The Prosecution Function, Standard 3-5.8(b)(same); id., Ch. 4, The Defense

Q. Do you want to see this man go to the chair for what he did to your son?

A. He -- he took a life. Yes, I do.

(J.A. 146)

Juries frequently hear evidence of the general type that was prohibited by Booth: testimony about the life histories of the principals in a trial and their intimates. In Booth this Court merely held that on a particular subject -- the harm to the victim's family -- such evidence is inappropriate in a capital sentencing trial. By contrast, juries never hear testimony of the type presented by the victim's father here, not on any subject, not in any trial.

Petitioner all but ignores this issue. The bulk of the Petition for Certiorari is addressed to the argument

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Function, Standard 4-7.8(b)(same).

that the Ohio Supreme court "wrongfully concluded that the devastating impact upon the surviving family is irrelevant" in a capital sentencing trial. Pet. at 15. In other words, the Petition appears to raise an issue under Booth.

Petitioner does address the victim's father's testimony in passing. It asserts that it "responded" to testimony elicited by the defense "that one of the victim's parents [his mother] did not desire the respondent to suffer the death penalty" by calling "the victim's other parent to state the contrary." Pet. at 7. This is a misleading characterization of the case in two respects. First, the victim's mother never said that she preferred any particular penalty, but only that it was left "up to the

Courts...[a]nd God." (J.A. 141.)[4]

Second, petitioner was not "responding" when it presented the father's testimony -- it had opened up this issue itself. Both the mother's statement that "the Court should do what it has to do" and the father's statement that Respondent "deserves to get the death penalty" were included in the Presentence Report that the prosecution presented in evidence, over defense objection, before any witnesses were called at the penalty phase. (J.A. 96-97, 99-101, 162.)

More important, the Ohio Supreme Court rejected Petitioner's argument on this point. It specifically found that the testimony of Mr. Harris as well as that of Mrs. Harris "was not rebuttal testimony." Huertas, 51 Ohio St.3d at 26, 553 N.E.2d at 1064. Such a finding presents no federal issue, and is not before this Court for review on certiorari. Nonetheless, Petitioner does not address the decisive issue on which the Ohio Supreme Court did rest its decision -- not in its Petition and not

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[4] In its Brief on the merits, Petitioner modifies its position and argues that "The wording of the question [to the mother] inferred [sic] that she had previously stated she did not [want Respondent to be sentenced to death]. J.A. 141-142. To counter this implication, the State called the victim's father, Ralph Harris, Sr., who stated that he desired the Respondent to suffer the death penalty. J.A. 145-146." Pet. Br. at 11 (emphasis added). See also Pet. Br. at 33-34.

This is a curious argument. The mother's testimony seems clear enough, but to the extent that there was any danger that the jury might have drawn inaccurate inferences from it, the prosecutor could easily have clarified her position during his redirect examination. Calling the victim's father could hardly be said to address this supposed confusion. Furthermore, the place where the mother might have made any possible inconsistent statement is in the Presentence Report -- which the prosecutor himself had already put before the jury, and where she in fact had said exactly the same thing she said in court.

in its Brief -- except in this passing fashion.

Unfortunately, Respondent did little to clarify this confusion in a timely fashion. Despite the fact that the syllabus of the Ohio Supreme Court opinion deals exclusively with the victim's father's request for a death sentence rather than with victim impact evidence -- and despite the fact that the Ohio Supreme Court plainly said: "the type of evidence given by the victim's family in this case goes beyond that considered in Booth and Gathers, supra," 51 Ohio St.3d at 26, 553 N.E.2d at 1064 -- Respondent's Brief in Opposition focuses heavily on victim impact evidence, and concludes that "This case falls squarely within the dictates of Booth v. Maryland and South Carolina v. Gathers." B.I.O. at 6.

Respondent did draw this Court's attention to the true issue in the case, belatedly, in a Motion to Dismiss Certiorari as Improvidently Granted. This motion correctly describes the syllabus as the governing law of the case, and argues that its holding was based on Ohio State evidence law. By then, however, certiorari had been granted on the question presented by Petitioner.

In its Brief on the merits, Petitioner takes a broader view. It now urges this Court, inter alia, "to reconsider and reverse Booth v. Maryland." Pet. Br. at 51. Several amici curiae have filed separate briefs arguing for the same result. Among them, the Solicitor General, commendably, notes that the testimony by the victim's father was also an issue in the case, and that:

> "Such evidence appears to go beyond showing the effects of the crime on the surviving victims and therefore ordinarily should not be admitted as a form of victim impact evidence."

Br. of U.S. as Amicus Curiae at 16. Other amici in support of petitioner miss this point entirely, or severely mischaracterize the record.[5]

In sum, this case has been presented to the Court as a vehicle for reconsideration of Booth and Gathers, when in fact it turns on a very different point.

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[5] The State of California argues (1) that Mrs. Harris was called as a penalty-phase witness by the defense, Br. of State of California as Amicus Curiae at 26, when in fact she was called by the prosecution (J.A. 127); and (2) that the defense initiated the presentation of evidence on the victim's parents' desires for punishment, Br. of State of California as Amicus Curiae at 27, when in fact the prosecution did so by introducing the presentence report in evidence. (J.A. 96.)

II. THE OHIO SUPREME COURT CORRECTLY HELD THAT TESTIMONY BY A HOMICIDE VICTIM'S RELATIVE REQUESTING A DEATH SENTENCE VIOLATES A DEFENDANT'S CONSTITUTIONAL RIGHTS IN A CAPITAL JURY TRIAL.

A trial is organized so that the duties of witnesses and of jurors are entirely distinct: Witnesses provide evidence, jurors judge it. This separation of functions is so basic that it may be overlooked, but it is critical. It would be strange to us to conduct a jury trial at which evidence was presented entirely by affidavit, or where the jurors rather than lawyers questioned witnesses, or in which the jury determined the law as well as the facts. It would be far stranger to our experience to call jurors to judge a case on information that they themselves

gather, or to present witnesses who line up on opposing sides and tell the jury under oath what judgment to reach.

This was not always so. In Anglo-Saxon England, criminal and civil cases were often tried by "compurgation." In this form of trial, a party would produce a number of oath helpers ("compurgators") to swear to the justness of that party's cause. J.B. Thayer, A Preliminary Treatise on Evidence at the Common Law 24-25 (1898) (Rothman Reprints, 1969). After the Norman conquest, when trial by jury was introduced, juries were originally "self informing": they either had pre-existing knowledge of the case, or they informed themselves out of court. T.A. Green, Verdict According to Conscience 16-17 (1985); Thayer, supra, at 90-94.

By the time of the American

Revolution, the roles of jury and witness had become fixed in their modern forms. In this format, trial by jury has been, since the founding of the nation, a peculiarly American political institution -- a system of justice that embodies a broad democratic ideal. As early as 1835, de Tocqueville described the central importance of the jury in our society: It places the direction of public affairs in the hands of the governed, protects individuals from arbitrary state power, allows the populace to participate directly in decisions about punishment and property rights, confers legitimacy upon institutions of law, and educates the public about its rights and

responsibilities.[6]

We can entrust these public functions to the jury -- an ad hoc collection of common citizens -- because its powers are both limited and exclusive. The rights of the parties and the interests of the state are protected by strict rules that require the jury to act only on admissible evidence presented by the adversaries in court, and to follow the judge's instructions on the law. The integrity of the jury's deliberations is protected by equally strict rules designed to insulate jurors from public passions, from interested people who might attempt to influence or intimidate or curry favor, or from any other external pressures to reach a

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[6] Alexis de Tocqueville, Democracy in America, Vol. 1, pp. 291-92 (N.Y.: Random House 1945).

particular decision.

American courts have been obliged to protect the jury system from threats from both directions. The more common problems, perhaps, concern the use of information jurors may gather from extra-judicial sources. Jurors are routinely instructed to consider only the evidence presented in court,[7] and they are specifically prohibited from conducting investigations[8] or experiments,[9] or

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[7] E.g., E.J. Devitt and C.B. Blackmar, Federal Jury Practice and Instructions §11.11 (3rd. Ed. 1977) ("Anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case.").

[8] E.g., People v. Holmes, 69 Ill.2d 507, 372 N.E.2d 656 (1978) (independent jury investigation constituted prejudicial error).

[9] E.g., People v. Brown, 48 N.Y.2d 388, 399 N.E.2d 51 (1979) (independent jury experiments on a witness's range of visibility from a motor vehicle

otherwise collecting evidence on their own.[10] On the other side, jury deliberations are carefully guarded from outside influence. They are secret,[11] and no non-juror may be present;[12] it has been held to be reversible error to so much as permit a jury to convene under

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constituted prejudicial error).

[10] E.g., People v. Honeycutt, 141 Cal. Rptr. 698, 570 P.2d 1050 (1977) (jurors cannot seek outside legal advice), and People v. Pierce, 155 Cal. Rptr. 657, 595 P.2d 91 (1979) (jurors cannot independently contact witnesses).

[11] E.g., People v. Oliver, 196 Cal. App.3d 423, 241 Cal. Rptr. 804, 807 (1987) ("We conclude then that private, confidential deliberations outside of the presence of all non-jurors are an essential feature of the right to an impartial jury trial guaranteed by the Sixth Amendment.").

[12] E.g., State v. Crandall, 452 N.W.2d 708 (Minn. App. 1990) (the presence of an alternate juror during deliberations creates a presumption of prejudice); People v. Boulies, 690 P.2d 1253 (Colo. 1984) (the presence of an alternate juror constituted error).

the supervision of a bailiff who has a stake in the case.[13] In some situations these two types of problems coincide. In highly publicized trials, for example, jurors may be subjected both to an unavoidable flood of off-record information, and to public clamor for a particular outcome. In such cases courts may be obliged to take strong prophylactic measures -- sequestration of the jury,[14] or change of venue,[15] or both.

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[13] E.g., Turner v. Louisiana, 379 U.S. 466, 471 (1965) (a defendant's due process rights were violated when two deputy sheriffs, who were key witnesses for the prosecution, acted as bailiffs, giving them close and continuous contact with the jury).

[14] E.g., Sheppard v. Maxwell, 384 U.S. 333 (1965) (failure to take adequate protective measures, including sequestration, violated the defendant's right to a fair trial).

[15] E.g., Groppi v. Wisconsin, 400 U.S. 505, 510-11 (1971) (the due process clause requires that change of venue be available as a remedy for juror bias,

In the context of evidence law, the clearest historical manifestations of American courts' protective attitude toward jury decision making are the "opinion rule" and the "ultimate issue rule." The former doctrine had roots in older English cases, but was developed primarily by American courts in the nineteenth century. In its strict form, it purported to exclude all inferences by witnesses and reserve them for the jury. As one leading case explained:

> The expression of opinions, the belief of the witness...are not proper evidence as coming from the witness; and when such deductions are made by the witness, the prerogative of the jury is invaded.

Donnell v. Jones, 13 Ala. 490, 511 (1848).[16]

This was not a workable plan. It not only kept valuable testimony from juries, but, as Wigmore argued with unanswerable clarity, it was based on the false premise that "fact" and "opinion" are distinct and recognizable categories. 7 Wigmore, Evidence §1919 (Chadbourn rev. 1978). Even at its inception a general exception was recognized for experts;[17] increasingly, other exceptions were

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even in a misdemeanor), and Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963) (the refusal to order a change of venue in the face of substantial adverse publicity violated the defendant's right to a fair trial). For District Court opinions ordering changes in venue, see, e.g., United States v. Abrahams, 453 F.Supp. 749 (D.Mass. 1978); United States v. Holder, 399 F.Supp. 220 (W.D.S.D. 1975); United States v. Marcello, 280 F.Supp. 510 (E.D.La. 1968).

[16] See also Baltimore & Ohio Railroad Co. v. Schultz, 43 Ohio 270, 1 N.E. 324 (1885); Graham v. Pennsylvania Co., 139 Pa. 149, 21 A. 151 (1891). See generally 7 Wigmore, Evidence §1917 (Chadbourn rev. 1979); McCormick on Evidence §11 (3rd. Ed., Cleary, ed. 1984).

[17] See e.g., Butler v. Mehrling, 15 Ill. 488, 491 (1854).

developed for lay witnesses.[18] Modern evidence codes have gone further. The Federal Rules of Evidence, for example, not only freely permit opinion evidence by a qualified expert (Rule 702), but also any "opinions or inferences" by a lay witness that are rationally based on the witness's perception, and helpful to the jury. Rule 701. See also, e.g., Cal. Evid. Code §800.

The "ultimate issue" rule followed a similar path -- up to a point. In its classic form, this rule excluded otherwise admissible opinion testimony (for example, testimony by a qualified expert) if it addressed an "ultimate issue" to be decided by the jury. Like the opinion rule, the ultimate issue rule was justified on the ground that such

[18] See McCormick on Evidence §11 (3rd Ed., Cleary, ed., 1984).

evidence "usurps the function of the jury"[19] or "invades the province" of the jury.[20] Unfortunately, the rule swept away a great deal of useful testimony on factual issues that were presented to juries for resolution. For example, in an action to recover on a windstorm rider to an insurance policy, it was held to be error to permit witnesses to testify that in their opinion the damage at issue was caused by wind.[21] As a result, this rule (like the opinion rule) has been abandoned in most American

[19] Chicago & Alton Railroad Co. v. Springfield & Northwestern Railroad Co., 67 Ill. 142 (1873). See generally McCormick on Evidence §12 (3rd. Ed., Cleary ed., 1984); 7 Wigmore, Evidence §1920 (Chadbourn rev., 1979).

[20] DeGroat v. Winter, 261 Mich. 660, 247 N.W. 69, 71 (1933).

[21] Wood v. Millers Mut. Fire Ins. Co., 243 N.C. 158, 160, 90 S.E. 2d 310 312 (1955).

jurisdictions.[22] For example, Rule 704 of the Federal Rules of Evidence provides that "testimony in the form of an opinion...is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." See also, e.g., Cal. Evid. Code §805.

Rule 704, however, does not permit opinion testimony on all issues. Opinion evidence on factual issues is admissible because it contains information that may aid the jury in its deliberations. But the opinion offered by the victim's father in this case was not on any factual issue, it was "an expression of...general belief as to how the case should be decided." McCormick, supra, §12. Testimony of that sort directly undermines the function of the jury.

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[22] McCormick, supra, §12 nn. 7-8.

Instead of telling the jurors what the witness knows or thinks it tells them what the witness wants, and forces them to decide whether or not to satisfy the witness's desires. As the Advisory Committee Note to Rule 704 makes clear, despite the repeal of the ultimate issue rule, other provisions of the Federal Rules of Evidence "afford ample assurances against the admission of opinions which would merely tell the jury what result to reach...." 56 F.R.D. 183, 285. Similarly, McCormick, while hostile to the ultimate issue rule itself, predicts that "all courts would exclude such extreme expressions." McCormick, supra, §12.

McCormick appears to be correct. American courts are extremely consistent in excluding testimony that amount to nothing more than a vote from the witness

stand.[23] "[Q]uestions which would merely allow the witness to tell the jury what result to reach are not permitted." Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983). Such opinions are particularly inappropriate when issues of guilt or innocence are involved. "[N]o witness should be permitted to give his opinion directly that a person is guilty or innocent, or is criminally responsible or irresponsible...." State v. Jiles, 142 N.W.2d 451, 455 (Iowa 1966). Similarly, opinions concerning what sentence should be imposed or what form

[23] See Higgs v. Hodges, 16 Ark. App. 146, 697 S.W.2d 943 (1985); O'Dowd v. Linehan, 385 Mich. 491, 189 N.W.2d 333 (1971); and Barger v. Mizel, 424 P.2d 41 (Okl. 1967).

of punishment is appropriate cannot be introduced.[24]

Questions of life and death are afforded no less protection. In Duke v. State, 134 S.W. 705 (Tex. App. 1911), the Texas State Court of Appeals held that while an expert should be allowed to testify as to the sanity or insanity of a defendant, the expert should not be allowed to express an opinion as to whether the defendant should be given the death penalty or an extended prison sentence.

[24] See Rodriquez v. State, 641 S.W.2d 669, 674 (Tex. App. 1983) (the refusal to allow testimony concerning whether or not incarceration was appropriate was not an error); Slayton v. State, 633 S.W.2d 934, 936 (Tex. App. 1982) (questions as to the appropriate treatment are acceptable while questions relating to the appropriate punishment are not); and Schulz v. State, 446 S.W.2d 872, 874 (Tex. App. 1969) (testimony by a witness that one form of punishment is preferable to another invades the province of the jury and was properly excluded).

> The conclusion to be reached in matters of this sort is for the jury. It is not the providence of the expert to give his opinion as to how the party accused of the crime shall be punished in case of a conviction.

134 S.W. at 707. At the sentencing phase, "the choice between death and life imprisonment is the ultimate issue for the jury," and witnesses may not speak to it. Payne v. Commonwealth, 357 S.E.2d 500, 506 (Vir. 1987).

In civil cases, the admission of testimony that tells the jury how to act is merely error under the governing law of evidence. The same may be true in some criminal cases. At the sentencing phase of a capital jury trial, however, this is inevitably error of constitutional dimensions. This Court has held repeatedly that a jury's discretion to impose the death penalty

must be "directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion); California v. Ramos 463 U.S. 992, 999 (1983). Testimony of this sort is bound to produce arbitrary judgments.

How are jurors to decide whether the defendant before them should be killed or spared? However carefully they are instructed, the discretion they retain is necessarily great. Cf. McCleskey v. Kemp, 481 U.S. 279, 308-13 (1987). This Court has said repeatedly that the jury's function is to "express the conscience of the community on the ultimate question of life and death." Witherspoon v. Illinois, 391 U.S. 510, 519 (1968); Booth, supra, 482 U.S. at 504. But jurors cannot know what the judgment of the community as a whole would be, and

they are not supposed to care. They represent the community by acting for it. They must look to their own consciences and make a decision that may be heart wrenching, perhaps devastating, and for which they are likely to have little preparation and no past experience. And yet they are told that they must reach their decision by reasoned deliberation on the evidence in aggravation and mitigation.

This is a fragile process. It can easily be destroyed. The present case is a troubling example.

Homicides are tragically common in this country, but few of them result in death sentences. In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), for example, the Attorney General of Florida explained that homicides that originated in "family quarrels, lovers'

quarrels, liquor quarrels" are particularly unlikely to produce death penalties. Id. at 612 n.37. The homicide at issue here is of that sort: Ediberto Huertas, heavily intoxicated and in a fit of jealous misery and rage, killed Ralph Harris, Jr., the man who supplanted him as the lover of Elba Ortiz. The community at large is able to understand the passions and provocations that arise in these contexts. For the family of the victim, however, a homicide can never be graded. The killing of a person they loved is always an unparalleled atrocity.

How does it affect the jurors in a capital case to hear the victim's father testify that he wants them to sentence the defendant to death? It might make them concerned about reproach from the community if they disregard the father's

wishes. Worse, it might lead them to simply defer to the father and avoid a painful decision; if it means so much to him, who are they to deny him? Since the judge has admitted the father's request in evidence, it is before them. They cannot ignore it; on the contrary, they are instructed to consider it. In order to spare the defendant's life the jurors must now explicitly reject a plea from a grieving parent. Consciously or unconsciously, the desire to avoid that explicit rejection will weigh heavily in the balance. Surely the presence or absence of testimony of this sort is not a "principled way to distinguish"[25] "the few cases in which the death penalty is imposed from the many cases in which it

[25] Godfrey v. Georgia, 446 U.S. 420, 453 (1980).

is not."[26]

In a recent study of capital sentencing, Dr. Lorelei Sontag conducted detailed interviews with thirty jurors who had served at the penalty phases of ten capital trials in California.[27] She found that most of the jurors had a very limited understanding of the content of the instructions they received, and of the legal nature of their task. In order to make sense of a difficult and painful assignment, they would often search for some statement that was made at the trial that would define the issue in simple, practical terms. The statements the

[26] Furman v. Georgia, 408 U.S. 238, 313 (1972) (Justice White, concurring).

[27] L. Sontag, "Deciding Death: A Legal and Empirical Analysis of Penalty Phase Jury Instructions and Capital Decision Making," Ph.D. Dissertation, Dept. of Psychology, University of California at Santa Cruz, U.M.I. No. 90-33148.

jurors used might come from any part of the trial -- instructions, argument, or evidence. The victim's father's statement that "since his son's life was taken... the defendant deserves the death penalty" could have served that purpose in this case. (J.A. 162.) If the jurors accepted this view as a framework for their decision, their judgment was preordained. If they did, that might explain why they sentenced Respondent to die for a homicide of a type for which death penalties are extremely rare.

The most telling indication of the courts' attitude toward this type of testimony is the extreme infrequency with which the issue is addressed. Apparently few prosecutors ever attempt to present witnesses to testify that the defendant should be executed, and when they do, judges rarely permit it. Robison v.

Maynard, 829 F.2d 1501 (10th Cir. 1987), one of the few cases on point, illustrates the process. In Robison the defense wished to present testimony from a relative of the victim urging the jury not to sentence the defendant to death, but the trial judge sustained the prosecutor's objection. 829 F.2d at 1503-04. The Tenth Circuit, on review of denial of federal habeas corpus, rejected a challenge to the trial court's ruling. The court noted that "the obvious consequence of allowing this kind of testimony by the defense would be to permit the State to present witnesses who would testify the penalty should be imposed, thus reducing the trial to a contest of irrelevant opinions." Id., at 1504. It held that:

> [A]llowing any person to opine whether the death penalty should be invoked would interfere with the jury's performance of its duty to exercise the conscience of the community.
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> * * *
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> [T]he testimony offered...was calculated to incite arbitrary response, thus it was properly excluded....

Id. at 1505.[28]

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[28] In State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), the Supreme Court of South Carolina faced a related issue. Adams testified at the guilt phase of his trial, and denied that he committed the homicide. On cross-examination, the prosecutor asked "Anybody who would do something like this ought to die, shouldn't they?", and Adams, after some equivocation, answered "Yeah, whoever done it." 283 S.E.2d at 584. The South Carolina Supreme Court held that this line of questioning was prejudicial error, both because it violated the defendant's Fifth Amendment right not to incriminate himself, and because the questions

> were designed to create a response, based on opinion, going to an ultimate issue reserved for jury determination the effect of having the appellant unwittingly state

Booth itself contains no testimony similar to that of the victim's father in Huertas, but some of the evidence that was presented leans in that direction. The victim impact statement in Booth included characterizations of the crime and the defendant by the victims' family. The victims' son for example, stated that his parents had been "butchered like animals," and their daughter stated that "The murders show the viciousness of the killers' anger. [She] doesn't feel that the people who did this could ever be rehabilitated." 482 U.S. at 508.

The majority discussed this issue in a separate section of the Booth opinion.

> that he deserved the death sentence prior to the jury having considered the matter created an "arbitrary factor" intolerable to this Court.

Id., 283 S.E.2d at 585.

Apparently it considered these statements the most troubling of the victim impact evidence.

> The admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases.

Booth, 482 U.S. at 508-09 (footnote omitted). Equally significant, the four dissenters in Booth acknowledged that the Court might properly decide that it was inappropriate to permit this type of emotionally laden opinion testimony in a capital sentencing trial. They argue, however, that the fact that such evidence was used in Booth's trial "is obviously not an inherent fault in all victim impact statements...." Booth, 482 U.S. at 518 (Justice White, dissenting).

The characterizations in Booth were certainly improper, but they are not as

disturbing as the testimony at issue here. In Booth the jury was merely told what conclusions to draw from the evidence; in Huertas, the victim's father told them what judgment to return.

The Ohio Supreme Court recognized that the testimony by the victim's father "goes beyond that considered in Booth and Gathers." Huertas, 51 Ohio St.3d at 26, 553 N.E.2d at 1064. Like the Tenth Circuit in Robinson v. Maryland, the Ohio Supreme Court held that:

> [O]pinions on the appropriate sentence given by someone who, though having a great personal interest in the outcome, is not a member of the jury....usurp the jury's function and undermine the defendant's right to trial by an impartial court.

51 Ohio St. at 27, 553 N.E.2d at 1064. The Ohio court adds the perceptive observation that "Such opinions, if credited, could make the imposition of

punishment dependent upon whether the victim's family believed in or was opposed to capital punishment...." Id. Surely this is a "totally irrelevant" factor that will produce arbitrary and unconstitutional capital sentencing. Zant v. Stephens, 462 U.S. 862, 885 (1983).

Perhaps the most unusual aspect of the Huertas case as it comes before this Court is the absence of any significant dispute about this holding. Petitioner (to the extent that it addresses the issue at all) merely argues that the victim's father's testimony was rebuttal -- an argument that does not address the issue, that is unsupported by the record, and that was rejected by the Ohio Supreme Court on state law grounds. See supra p. 15-17. Respondent, of course, has no quarrel with the Ohio Supreme Court's

opinion, and the amici curiae in support of petitioner do not address the issue -- with the exception of the Solicitor General.

The Solicitor General's position on this question is interesting. He writes:

> Part of the evidence complained of in this case was an opinion by the victim's father that respondent should receive the death penalty. Such evidence appears to go beyond showing the effects of the crime on the surviving victims and therefore ordinarily should not be admitted. But admission of that evidence does not require affirmance of the ruling below.

Br. of United States as Amicus Curiae at 16 n.8. The first assertion -- that the victim's father's testimony was inappropriate -- is clear enough. If the United States were a party to the case, it would constitute a confession of error. Why then is an affirmance not required? The Solicitor General argues

that the Ohio Supreme Court "clearly" decided the case because it felt bound by Booth; he suggests that this Court overrule Booth and remand the case to Ohio "to permit the state courts to determine in the first instance whether the opinion evidence from the victim's father requires reversal of the death sentence." Id.

With all respect to the Solicitor General, this suggestion does not make sense. It would require this Court to reverse a state supreme court that reached a correct result, and to return an advisory opinion. There is no question that the Ohio Supreme Court will view the victim's father's testimony as sufficient to warrant reversal of the death sentence -- it has already said so. Its opinion, and the syllabus make it unmistakably clear that the Ohio Supreme

Court already reached that conclusion and acted on it.[29]

The Ohio court might have rejected the victim's father's testimony on the basis of state evidence law -- which does mandate this result.[30] If so, that is an

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[29] The Solicitor General argues that a reversal followed by a remand for reconsideration is a course "similar to the one suggested by Justice O'Connor in her dissent in Gathers." Br. of United States as Amicus Curiae at 16 n.8. This is not so. Justice O'Connor stated that she would "decline respondent's invitation that this Court comb the record" for a factual basis for upholding the decision on a ground that was not addressed by the court below. 109 S.Ct. at 2212 (Justice O'Connor, dissenting). In this case the issue is a simple question of law -- the facts are not in dispute -- that was considered and decided by the Ohio Supreme Court.

[30] City of Urbana v. Downing, 43 Ohio St.3d 109, 539 N.W.2d 140 (1989); Trebotich v. Broglio, 33 Ohio St.2d 57, 294 N.E.2d 669 (1973); Shepherd v. Midland Mut. Life Ins. Co., 152 Ohio St. 6, 87 N.E.2d 156 (1949); Mynatt v. Drenik Beverage Distributing, 188 N.E.2d 612 (Ohio App. 1963); and Dickman v. Struble, 146 N.E.2d 636 (Ohio App. 1957).

adequate and independent state law basis for the decision, which deprives this Court of jurisdiction. Alternatively, the Ohio Supreme Court's citations to decisions by this Court might be interpreted to mean that it reversed because testimony such as this produces arbitrary death sentencing, in violation of the Eighth Amendment. But that analysis is correct. It is supported by precedent, by logic, and, apparently, even by the Solicitor General.

Quite aside from the case or controversy requirement of Article III, it would make no sense to reverse the Ohio Supreme Court on an issue on which it did not decide the case, and to remand to that court to reconsider an issue which it decided correctly. Instead, we respectfully submit, this Court should affirm the decision of the Ohio Supreme

Court because it correctly applies the Eighth and Fourteenth Amendments to preclude a practice that would threaten the integrity of jury sentencing in capital cases.

CONCLUSION

The judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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December 17, 1990